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FILED

APPENDIX

In The

Supreme Court of the United States

October Term, 1973

No. 73-675

CHARLES WOLFF, JR., et al.,

Petitioners,

v.

ROBERT O. McDONNELL, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI
FILED OCTOBER 22, 1973

PETITION FOR WRIT OF CERTIORARI
GRANTED JANUARY 21, 1974

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RELEVANT DOCKET ENTRIES

In the United States District Court
For the District of Nebraska

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, and on behalf of all other persons who in the future may be confined in the Nebraska Penal and Correctional Complex,

Plaintiff,

vs.

MAURICE H. SIGLER, individually and as Warden; CHARLES WOLFF, JR., individually and as Associate Warden of Custody. RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants, all employees of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska,

Defendants,

MEMORANDUM

Of Papers Filed, and Date of Filing

Civ. 1722 L

Jan. 11	1971	21.	Amended Complaint. Exhibits attached.
Mar. 29	1971	24.	Temporary Injunction (WKU)
Mar. 31		25.	Defs' motion to reconsider & w/d Temp. Injunction.
		26.	Order (WKU) for hrg. to reconsider Temp. Inj.
Apr. 19		28.	Order (WKU) staying temp. inj. pending further order (Filing No. 24)

Jul. 28	1971	34.	Order (RVD) re: Visitation Rights, etc.
Aug. 17	1971	36.	Report of Pre-Trial Order (RVD).
Aug. 24	1971	39.	Df's Answer.
Oct. 1,	1971	42.	Stipulation of Facts.
Oct. 1,	1971	43.	Transcript of hearing before Hon. W. K. Urbom.
Nov. 23,	1971	51.	Exhibit List.
Apr. 21,	1972	55.	Order (RVD).
Jun. 1	1972	70.	Transcript of Trial—11/23/71.

STIPULATION OF FACT

(Filed October 1, 1971)

In the United States District Court
For the District of Nebraska

Civ. 1722 L

[Vol. I, Filing 42]

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, and on behalf of all other persons who in the future may be confined in the Nebraska Penal and Correctional Complex,

Plaintiff,

vs.

MAURICE H. SIGLER, individually and as Warden; et al.,

Defendants.

• • • • •

3. The regulation regarding censorship of mail to and from attorneys. All mail from attorneys to inmates and from inmates to attorneys at law is inspected and purportedly read for contraband or for security reasons. If a letter contains no risk to security or no contraband, it is immediately passed on to the inmate, or to the attorney.

There exists a transcript of testimony adduced at a hearing before The Honorable Warren K. Urbom, Judge, on April 15, 1971, in Lincoln, Nebraska, attached hereto as Exhibit A and made a part of this stipulation.

• • • • •.

5. The procedure that prohibits one inmate from assisting another inmate in the preparation of legal documents. The inmate legal assistant is the only inmate specifically approved to assist other inmates in the preparation of legal documents without the express approval of the warden. An inmate may make a request to the warden that another inmate (not the inmate legal assistant) be allowed to assist him in the preparation of legal documents; the warden may or may not grant this request depending upon the circumstances. The affidavit of inmate legal assistant Maddox describing his responsibilities is attached hereto and made a part hereof as Exhibit B1.

• • • • •.

12. The procedures used in taking good time credit from inmates. See Exhibit C attached hereto and made a part hereof.

13. The Inmate Handbook of March, 1970, is not all inclusive, but is a broad outline of the rules and regulations of the Complex to which the inmates are subject. It is attached hereto and made a part hereof as Exhibit D. Attached to Exhibit D is Exhibit E, 12 additional directives of the Complex numbered E1 through E12 of which the inmate is also charged with knowledge. It is hereby made a part of the stipulation of facts. Exhibits D and E are admitted into evidence in the above entitled action.

14. That Exhibits A through H, as attached to the Amended Complaint in the above entitled cause of action are true and correct copies of the documents which they purport to represent, and if called as witnesses in the above entitled action, all persons whose names appear signed to Exhibits A through H would testify as to the authenticity of their signature and that the Exhibits A through H do correctly represent the matters on the face thereof and, therefore are admitted into evidence in the above entitled action.

• • • • •

ROBERT O. McDONNELL, et al.,
Plaintiffs,

By /s/ Robert O. McDonnell

MAURICE H. SIGLER, et al.,
Defendants,

By /s/ Mel Kammerlohr
Mel Kammerlohr
Assistant Attorney General

Their Attorneys

Note: Exhibit C1 to Filing 42, found at Vol. IV, pp. 3-7, of the Record the "General Policy and Procedure." *Inmate Control Misconduct and the Adjustment Committee*, April 1, 1971, is found at Appendix Q of Petition for Writ of Certiorari, App. 44-47.

(Title omitted in printing)

TESTIMONY OF MAURICE SIGLER

[Vol. III, 3:4-10:12]

[Page 3] Q. Will you state your full name please?

A. My name is Maurice Sigler.

Q. And what is your business or profession, Mr. Sigler?

A. I am director of the Division of Corrections in Nebraska; and I suppose I should add also Warden of the prison.

Q. And is that of the Nebraska Penal and Correctional Complex?

A. That is correct.

Q. And is that the same institution that the petitioner herein is now in custody?

A. That is correct.

Q. How long have you been associated with the Nebraska Penal and Correctional Complex?

A. It will be 12 years the 22nd day of June of this year.

Q. And has that been as warden all that period?

A. I have been warden there all that time.

Q. What was your experience with penal institutions prior to that time, if any?

A. I began this work in 1939 in Leavenworth, Kansas, in the federal institution there. I was there 7 years with two years out for the war. I was in Seagoville, Texas, in another federal institution for seven years; and about six and one-half years as warden of the penitentiary in Louisiana — the [Page 4] state penitentiary there. And

I served a year doing research and training work in the Department of Corrections in Florida before coming here.

Q. Now in all that penal administration you have had, has it been your practice to enforce censorship of mail rules between inmates and their attorneys or of attorneys and their inmates?

A. Yes, sir.

Q. And is that done at the Nebraska Penal and Correctional Complex at this time?

A. Yes, sir.

Q. Now is it your purpose to stop the mail that goes from inmate and his attorney, and the attorney to the inmate?

A. No, sir.

Q. What is the purpose of censoring this mail?

A. Censoring has only one purpose, and that is for security of the institution.

Q. All right. Can you tell the Court what your — first what your theories of how this relates to security are?

A. Well throughout the years the mails have been used for introduction of contraband into institutions everywhere. Money is easily introduced through the mail; narcotics are easily introduced through the mail; escape plots are easily introduced through the mail — and I have had experience in all of these.

[Page 5] Q. All right. Other than just a *fear* that you may have, you have had some actual experience with some of these things?

A. I have had experience with all of those things.

Q. Can you just describe what specific instance you may know of that —

A. Well I couldn't tell you how many times money has been found coming in, in an unauthorized manner, coming

in through the mail. We have had powdered heroin come in through the mail during my tenure of office. Within the past 18 months or 2 years — about 18 months, we were able to head off a big escape in the institution through mail detection.

Q. That was here at the Nebraska Penal Complex?

A. That was right here at this institution. And incidentally we have had money come into the mails — come in through the mails here in an unauthorized manner.

Q. All right. First, on this money matter, what harm can unauthorized money do to a penal institution?

A. Well money in a penal institution is much more valuable than it is on the street. In other words, a little of it will do much more than a like amount will do on the street. It can be used to coerce employees, which it is very frequently. We are constantly on the alert to keep employees from introducing contraband into the institution. I am speaking of pills — narcotic pills, things of this sort. [Page 6] Even weapons. This is something we find all the time. In fact, in this state we have had, right offhand I can think of two employees who have been caught doing these things, and ultimately put into court and convicted and served time at the complex.

Q. Well now as a matter of procedure do you have different areas at the complex where it may be easier for an employee to bring something in to an inmate than in other areas, or something of that nature?

A. No, I don't think so. The contraband is brought in on the person of an employee; and these employees, I of course am speaking primarily of untrained, newer custodial help — that is uniformed help. I would want to make it very clear here that not all of our people — very few of our people are dishonest. But these are things that happen, and they happen constantly. The first time I can remember of anything like that happening was in 1941 in Leavenworth, Kansas, in the federal prison. That is the first experience I had with this — and that is a long

time ago. But it has been going on constantly throughout the years — this thing.

Q. And if you didn't have this one safeguard of preventing money or other things coming through the mail would this cause you to have to tighten up some other place?

A. Well, yes because — the fact of the matter is this would be one area we wouldn't be able to tighten up on until we found [Page 7] the money or until we found somebody caught in the act of bringing something into the institution. I might say, the most recent money that we picked up was probably about 7 or 8 weeks ago in the amount of $55 — maybe a little longer than that. But this is a constant source of problems in prisons.

Q. Well if a man had enough money just what could he do with it other than buy — ?

A. He could just about buy anything. We know this: That a gun — a loaded gun was introduced into our institution. We got the gun with 7 bullets in it some years ago. That is one thing that can be done. The most common thing that is done with money in a place like ours is the introduction of narcotic-oriented materials; pills; a thing called "Wyamine" inhaler — I have seen those sell as high as $5 in prison, because of the fact you can take the body from them and soak it in water and inject it into your vein or you can take it and chew it — whichever you prefer. Those are the most common things.

Q. Have you had any experience of violence in your institution here in Nebraska of rioting or individual violence or —

A. Well individuals, yes. Many I would say, relatively speaking because we have it often. Some people might not think it was often, but it will average several times a year.

Q. What provocation usually starts this off?

A. Well as a rule, a man who is serving time before he will — [Page 8] as a rule before he will do something

like that must be under the influence of something that will give him a false courage, either pills or liquor. I haven't mentioned liquor, but it hasn't been 10 days since we caught an inmate outside the walls drunk; and he had a bottle of good Vodka — it was a licensed Vodka — in fact he had two bottles of it.

Q. When you say outside the walls, you mean —

A. Minimum custody. Well you know at the complex out there we have minimum custody quarters and then we have close and medium. Close and medium are inside the walls. The minimum custody people live outside the walls; and this is where this happened.

Q. So he still wasn't able to go to a liquor store and obtain it?

A. Oh, no.

Q. Somebody must have brought it in and —

A. Somebody brought it in.

Q. Do you feel that if they didn't have money that you didn't know about it would be much more difficult to obtain contraband?

A. Oh, yes; because that is the name of the game everywhere — money. And these people won't introduce for the most part — I suppose there have been occasions when somebody stupidly brought something in for no monetary gain of any [Page 9] kind; but the way this is done is that unscrupulous inmates prey upon employees who are naive, maybe have a little larceny in their heart anyway; and this is the way this sort of thing is done in prisons everywhere — and ours is no exception.

Q. Specifically getting down to attorneys, have you had any Nebraska attorneys in your custody committed by a court?

A. Several.

Q. Since you have been out here at Nebraska?

A. Several.

Q. And in there for crimes?

A. Crimes — felonies. They were placed there by the court.

Q. When you say several, can you give us an idea of —

A. Oh, I would say 5 or 6; I can name 2 or 3. A man named Massey was there and I believe Haines, Paul Rhodes — but that isn't all of them. I just don't right at this time —

Q. Was there an attorney named Stan Scott?

A. He was there. The fact of the matter is when I came — right after I got here he came to this prison.

Q. Markel?

A. Markel — I remember that name.

Q. Other than attorneys being committed, have you had any experience with any attorneys possibly naively violating your security there?

A. Well we know that, and this isn't — we know that happens, [Page 10] and it has been detected a number of times. The most dramatic case of a man who is an attorney doing something that would be extremely dangerous to the welfare of the institution, as he came into the turnkey area — the turnkey area is in the first locked gate inside the main prison — a few years ago; and when he was asked if he had anything in his briefcase he said "no"; and we said "well, do you mind if we look?" And he said "no". And he had a loaded .38 in it. He got that close to inside the prison with it. I don't believe this man had any evil intentions with this gun at that point; but he did have it with him, and we took it away from him.

• • • • •

[Vol. III, 15:10-20]

[Page 15] Q. And you have never communicated any information from an inmate to his client — or from an attorney to his client to the State Attorney General's office?

A. We don't tell anybody anything. May I just offer this to further answer that question?

Q. Sure.

A. This is so much a part of our operation today that it is just about as common — it is as common as going to mess hall. I don't think there is a day but that some sort of a writ leaves that institution going somewhere; and it is just standard operating procedure.

• • • • •

[Vol. III, 16:20-17:20]

[Page 16] Q. Warden, has Mr. McDonnell been involved in any of these escape plans that you talked about through the mails?

A. No.

Q. And I take it I haven't so far as you know been involved in any of these?

A. No.

[Page 17] Q. You haven't uncovered anything that I was involved in?

A. Oh, no; no, sir.

Q. Now do you censor mail from judges?

A. We open the mail from everybody.

Q. Do you censor the mail from judges?

A. Yes.

Q. And the mail from everybody that comes in?

A. Everybody.

Q. Now so far as the contraband is concerned, you don't have to read the letters to find out whether there is contraband in the envelope, do you?

A. No; not if there is contraband.

Q. And we are talking about money is contraband and narcotics — ?

A. You can see that.

Q. And all these other items that are contraband?

A. Yes, sir.

Q. So as far as actual censorship is concerned you don't have to read the letters to determine whether or not any contraband is being sent in to an inmate?

A. Not in that letter.

• • • • •

[Vol. III, 21:4-21]

[Page 21] Q. Now in this particular case, do you know if any restriction has been placed on Mr. McDonnell about obtaining information from other inmates concerning claims of denial of rights within the penitentiary?

A. What do you mean by restriction?

Q. Well do you know whether or not Mr. McDonnell has been prohibited by your internal rules and regulations from obtaining the names of inmates within the penitentiary who claimed to have had civil rights violated?

A. This would not be true. It might be that he has been denied the privilege of working with other inmates, other than our man who has been appointed to — inmate who has been appointed to handle this deal. I don't know whether Mr. McDonnell has been in there or not, but he has been everywhere in the yard. There would be no reason he couldn't visit with anybody that was there; but he is not prohibited from visiting with anybody who is not under punishment — and Mr. McDonnell is not under puishment.

• • • • •

[Vol. III, 24:13-18]

[Page 24] Q. As I understand it so far as contraband is concerned, this is a major concern of yours—you don't have to read the mail to determine whether or not there is any contraband in it?

A. No, you don't have to read it — anything you can see, of course, you don't need to read.

• • • • •

[Vol. III, 25:22-27:11]

[Page 25] Q. You are not trying to prohibit the exchange of ideas?

A. Oh, no; we don't even listen to those. It is none of our business.

Q. And actually the exchange of mail, isn't that an exchange of [Page 26] ideas?

A. Well again the reason we don't allow them to exchange mail we want these things recorded.

Q. But I mean the exchange of thoughts through the mail, isn't this an exchange of ideas?

A. Well it could be; yes, I would think so.

Q. As I understand it, it is not your purpose though in censoring it to interfere with the exchange of ideas; that you are really looking for contraband or you are looking for escape plots?

A. We are looking for the safe conduct of that institution and nothing else. We have a constant turnover of people. We have on an average — well right now the count is 991 people, and we don't know much about any of them; and so to answer your question, we do search carefully. If we do our job right then we won't have any trouble.

Q. How is the safe conduct of the institution impeded by not censoring the exchange of ideas between the attorney and inmate?

A. Well I have tried to answer that question before; but I will put it this way: Dope can be — there is an expert in the room who will probably testify to this, but I will try to answer it. LSD — one drop of LSD can be dropped on a piece of paper, and that is enough to give a guy a trip. On one sheet of paper, I wouldn't attempt to tell you — I [Page 27] don't know how many drops of LSD could be effectively placed, but this could happen. And it is not the attorney exactly — I would not be scared of you, for example. But I know this, unscrupulous people can get your — can get the envelopes with your name on it; they can get correspondence with your name on it; they can get pictures. We have forgers come into our penitentiary nearly every day of the year, and they beat people all over the state — and so they can beat us. And let me assure you, sir, that most people who are in court are not above trying to do these things.

* * * * *

[Vol. III, 28:4-29:9]

[Page 28] A. * * *. Now in Lincoln, Nebraska, maybe this won't happen because the people live right here — but this thing I was talking about earlier, the escape plot, this was not within this state — and all attorneys don't work out of Lincoln, Nebraska — and this is why I say this is an extremely dangerous thing.

Q. But couldn't, if someone was going to conceive an escape and were going to plot it couldn't the wife visit her husband?

A. Maybe not. Maybe she is too far away. Maybe they are other people in the whole community. You don't just deal — on this escape plot there was one — two — five people involved that I know about at this point.

Q. Was it all carried on through the mails?

A. All the information went out through the mail with the exception of one visit.

Q. Didn't you get your information through some other source before—

A. I got, to begin with, yes, sir; but I was told also how to detect it.

Q. It was a snitch?

A. It was a snitch; yes, sir. And Mr. McDonnell knows who he is, [Page 29] and all of this I will concede to you; but this is the way we did it.

Q. Was the mail that you censored and picked this out, was this coded?

A. Oh, yes.

Q. You wouldn't have picked it up in any event without the informer?

A. In this particular thing I don't think I would have, because it was very well done.

* * * * *

[Vol. III, 31:22-34:7]

[Page 31] Q. I take it, so far as attorneys are concerned, your restriction is based upon the possibility of an unscrupulous attorney collaborating with an inmate?

A. That, I guess, is one way to say it. The reason we do it is, [Page 32] we have one rule for everybody—everybody. We make no exceptions. And we don't consider anybody to be unscrupulous; but it is our responsibility to see—this is the kind of oath I take, that we don't allow anything dangerous to come in or go out; and that the safety of the people are my responsibility; that is, the men with numbers. It doesn't say anything about the safety of the employees being my responsibility, but it does say I believe very clearly the safety of the institution is the responsibility of the administration.

Q. And weighing all these factors, it is your judgment that the possibility of an unscrupulous attorney is such that you feel that this type of mail needs to be censored?

A. Yes. Well, I would say there is just as much possibility of there being an unscrupulous attorney as there is an unscrupulous plumber — and so, yes; the answer would be yes.

Q. You are not basing this on any —

A. No facts.

Q. It is just a general —

A. Other than the fact, as you stated a moment ago, that everybody from all professions come to the penitentiary, which they do; which means that people from all professions can be crooked. And I am not able to detect a man's honesty or crookedness by the way he looks. This is what I was trying to say.

[Page 33] Q. You indicate you are not experts in detecting forgers. Do you have experts to determine whether or not there is LSD, a drop on a piece of paper?

A. No; but we can tell whether there is something wrong with the — you know, if it doesn't look right why we hold it out. We have taken things before. I don't know whether I have here or not, but I have submitted mail in the past that looked — especially in the place where we had many narcotic offenders — that didn't look good — I submitted it to laboratories.

Q. Did any of this mail come from an attorney?

A. I don't think so.

Mr. Kauffman: I have no further questions.

The Court: Mr. Kammerlohr.

MAURICE SIGLER

Reredirect Examination

By Mr. Kammerlohr

Q. What you said a while ago about unscrupulous attorneys could also apply to naive attorneys in the ways of prisons, isn't that true?

A. This is correct.

Q. In other words, an attorney may not necessarily know there isn't anything wrong with sending $100 in to his client on somebody's request?

A. I can illustrate it this way: Not too long ago an attorney [Page 34] carried a letter out for a man, which is absolutely against all regulations. He still comes out to our place after we had a visit with him. I am sure he did it because he was naive. I don't consider the man to be unscrupulous or crooked in any manner. But he was naive to the point that he allowed this inmate to talk him into carrying the letter out; and he told me he did.

* * * * *

(Title omitted in printing.)

TESTIMONY OF JOHN B. GREENHOLTZ

[Vol. III, 38:4-41:17]

[Page 38] Q. Will you state your full name please?

A. John B. Greenholtz.

Q. Will you tell the Court your present profession or employment, Mr. Greenholtz?

A. I am the Chairman of the Nebraska Board of Paroles.

Q. And prior to that position did you have a position at the Nebraska Penal and Correctional Complex?

A. Yes.

Q. And what was that?

A. Deputy warden.

Q. How many years were you deputy warden?

A. 21.

Q. Did you have any other penal experience before that?

A. I was a captain a couple or three years, and then I was assistant deputy warden prior to that until I was appointed deputy warden.

Q. Now have you heard Warden Sigler testify to the Court here just ahead of you?

A. I did.

Q. And did you hear him tell about his experiences with the rules as far as censorship of mail is concerned?

A. I did.

[Page 39] Q. Do you have any theories different than the warden's or would they be about the same as to why mail should be censored and so on?

A. I would have to agree with everything he said, because it is utterly important that he does have censorship for the security of the institution. You must remember we have all types of people there and for various reasons. Some of them are accomplished forgers. One method that wasn't brought up is some of the print shops will print any letterheads or forms, and they could be used by unscrupulous people in order to introduce contraband into the institution, pass out escape plots, and so forth. And as he also mentioned, this mail, if it was ever ordered by the Court that no one could touch it, it would be a most logical place to hide contraband. And they must continually have searches to prevent the accumulation or introduction and accumulation of contraband.

Q. They must continually or regularly search the cells of the inmates?

A. The cells and person of inmates, and areas of the institution. Not only just the cells but all other areas.

Q. Now was this censorship practiced at the penal complex the years you were out there about the way the warden described it?

A. Yes, sir. And we have prosecuted employees for bringing [Page 40] in contraband and attempting to take out sealed letters to people passing the censorship.

Q. All right.

A. And incidentally there is one case — Mr. Meyer knows about this, because I referred it to him, an attorney in Lincoln at the present time — I won't mention his name — attempted to take out a sealed letter. His excuse was he didn't know it was against the rules and regulations. I am not saying he wasn't naive and gullible, but he did attempt to do it.

Q. This was how long ago?

A. About three years ago.

Q. While you were still deputy warden?

A. Yes, sir. And he is still practicing law incidentally so — he wasn't prosecuted. I just called it to the Attorney General's attention, and he wrote him a letter explaining the policies, and so forth. I wanted him to handle it, rather than us.

Q. Now then, have you heard the Warden's testimony about some of the evils of getting unauthorized money in to an inmate?

A. Yes, sir.

Q. Would you agree they would be able to use this money for obtaining weapons or contraband?

A. Special favors, contraband, attempt contraband — any item [Page 41] that is considered contraband in the institution. If some of our employees, which unfortunately are not the type of people who are highly educated, and

they don't learn too much of the background; and they have been used — some of them as I have mentioned are naive and gullible—and we have some inmates confined there, offenders confined that make you think white is black.

Q. And they are —

A. Very persuasive.

Q. And they persuade these employees to do things?

A. And they have ways of threatening people, intimidate them, extortion, and so forth.

Q. Now if an inmate has unlimited use of the mails or uncensored use of the mails would you think he might ever do that through the mail — intimidate — ?

A. It would be the biggest loophole I can think of at the present time for the introduction of contraband.

• • • • •

[Vol. III, 46:4-13]

[Page 46] Q. If a way could be devised so that you wouldn't have to read the contents but could still continue to search for contraband this would promote your policy?

A. All I could see is problems evolved from it.

Q. You are assuming that a way can't be devised, I take it?

A. Not that I can think of that would be satisfactory to all concerned, because the first time a custodial officer walks in his cell to search immediately he would have a problem with the inmate. If the inmate wasn't there he would still accuse him of it.

• • • • •

(Title omitted in printing.)

TESTIMONY OF ROBERT O. McDONNELL

[Vol. II, 25:10-22]

[Page 25] Q. To the best of your knowledge have you ever been written up for helping another inmate? First of all, what does "written up" mean?

A. A write up is a procedure in a disciplinary action where they take you in front of a disciplinary board and take away your good time.

Q. Well, they don't necessarily do that, do they?

A. Well, you are indoctrinated in the I. D. C. and I used to be a clerk over there and in the speech given by Mr. Jones and Mr. Wolff when they speak over there was that any appearance in front of a disciplinary board is an automatic loss of five days.

• • • • •

[Vol. II, 26:1-19]

[Page 26] Q. How many requests for assistance do you receive in a week or have you received in a typical week, do you have any idea?

A. Sometimes one or two, sometimes more. It varies, it is sometimes just for advice and sometimes just conversation.

Q. Do you send kites or have you sent kites on more than one application or more than one incident to get permission to help an inmate besides the evidence we have introduced here?

A. I think I have written two or three times and in conversations I get the idea it is futile to write. I get no answer and you know they don't write.

Q. Have you ever been granted permission to help another inmate?

A. No, I have not.

Q. Has any inmate been given permission to help you?

A. No, they have not.

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[Vol. II, 28:9-30:12]

[Page 28] Could you tell the Court some of the reasons about why you would not go to the Inmate Legal Assistant, just generally, is it just competence or are there other reasons?

A. The reasons I did not use the former Legal Assistant, Mr. Maddox, was for the reason that there were certain areas of my personal cases that I did not care to have the Inmate Legal Assistants know. In other words, I think the communications between me and the courts and my personal case and the courts and my lawyers was not such that I could allow the Inmate Legal Assistant to have access to this information. As to the present Inmate Legal Assistant, there is the same thing. There are many things that I will discuss with the present Inmate Legal Assistant that I would not with the former one

[Page 29] A. (Continuing) as Mr. Hoffman is a far more qualified or has a better ground in law than the previous one.

Q. You have been in the penal complex since February of 1970, that is not quite two years. Do you consider that you know the general attitude of the prisoners not on any specific cases but with regard to how they feel about having their trials and personal knowledge known by other inmates?

A. Yes, I know it very well.

Q. Does the inmate population generally feel this way, the way you do, that they do not like having someone arbitrarily designated by the administration to be privy to their court proceedings and personal matters?

A. Yes.

Mr. Kammerlohr: I will object to this, Your Honor, he is again calling for a conclusion, hearsay, and it is incompetent.

The Court: He says he knows. Overruled.

A. (Continuing) The general consensus of the majority is similar to mine, that many of them vehemently oppose having any knowledge of their case for various personal reasons, the type of crime and so forth, the different types of actions and their particular case, of allowing this information to

[Page 30] (Continuing) get out in the general population which can cause many hard feelings and lead to repercissions of a violent nature, and the other is the fact that many people feel that when they submit information to the Legal Assistant's office that this information is going strictly straight to the administration which leads them to a very vulnerable situation.

Q. That is just the general feeling?

A. This is the main reason why some people do not submit some of their stuff, they will discuss some of it, but they won't discuss all of it.

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[Vol. II, 53:1-22]

[Page 53] Q. (By Mr. Duchek) Mr. McDonnell, have you ever been called up before the Adjustment Committee?

A. The Disciplinary Committee?

Q. Have you ever been called up before the Disciplinary Committee?

A. Yes, I have.

Q. Well, it is now called an "Adjustment Committee", are you saying when you were called up before it it was called the Disciplinary Committee?

A. As far as I know it is still a Disciplinary Committee whether that is the way it is referred to or not.

Q. Do you know what date that was?

A. I have it in my notes, but I don't, just offhand here, I can't say.

Q. Do you remember why you were?

A. Well, I didn't know when I went there at the time.

Q. When did you first learn why you were called before them?

A. When I walked into the captain's office where they were holding it, and Mr. Wolff, and I think Mr. Phillips were in there.

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[Vol. II, 54:11-14]

[Page 54] Mr. Duchek: Your Honor, I would only call the Court's attention to the rules which have been stipulated to in Exhibit C. They do not call for prior notice. I think that is sufficient.

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[Vol. II, 72:18-74:8]

[Page 72] The Court: Mr. McDonnell, how much education have you had?

A. Twelfth grade.

The Court: Did you graduate?

A. Yes.

The Court: What school?

A. Denfield, Duluth, Minnesota.

The Court: Have you been married?

[Page 73] A. No.

The Court: You don't have a family?

A. No.

The Court: Are your mother and father still alive?

A. No.

The Court: You have no dependents?

A. No.

The Court: You testified that you had been in three other institutions, I believe, and one was in South Dakota, was it?

A. No, it is Colorado and Idaho.

The Court: It was in Colorado and Idaho?

A. Yes.

The Court: How does the Nebraska Penal Complex compare with those other institutions with reference to the allegations you make in your complaint here?

A. Well, the period of time that I was in Texas some years ago, but as far as to say that in none of the other three institutions have I had any legal work done either on my criminal case or on a civil case or any legal work at all until I come to the Nebraska Penitentiary, and I was completely frustrated.

[Page 74] The Court: They wouldn't allow you to?

A. No.

The Court: Did they have a law library for you?

A. There was a law library of sorts when I come to the Nebraska Penal Complex.

The Court: No, I mean in the other institutions?

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[Vol. II, 75:17-78:22]

[Page 75] The Court: Mr. McDonnell, tell this Court in your own words right now today what your specific objections are? Now, not just general objections to being incarcerated, anybody would object to that, but since Mr. Wolff has taken over, things have been fairly decent, haven't they?

A. There has been a great sign of improvement.

The Court: What specifically are you complaining to this Court about?

[Page 76] A. Specifically, the main three areas I am complaining to this Court about at this particular day and this particular time is, one is the good time arrangement that they just arbitrarily—a guard will just arbitrarily say, "Well, you are doing something wrong and we will write you up." You know nothing about it. A day or two days later you are called up to court and Mr. Wolff or one of his representatives say, "We sentence you to spend 10 more days in the Nebraska Penal Complex." By taking your good time away that is in effect what they are doing.

The Court: You understand there is a difference between discretionary good time and statutory good time, do you not?

A. Yes, but the thing is that this is when you appear in front of a disciplinary committee.

The Court: Well, what your complaint is that you don't have enough notice to prepare a defense, is that right?

A. You don't have notice and you are not even allowed to even contest the charges other than the fact that Mr. Wolff or his representatives just say, "We have written so-and-so up for being on the wrong tier and we are taking away so much good time."

[Page 77] A. (Continuing) And you say, "I didn't do it." and they say, "You lost ten days. Next man."

That, in essence, is your hearing. I think if a man is going to be sentenced to spend ten days longer in the Nebraska Penal Complex by this arbitrary method his very first thing to do I would say would be to contact the guard that wrote him up for the infraction but the thing is you are not allowed to do that and you are getting no notice before going up there.

The Court: So what you are complaining about then is you are sentenced to additional time, you really are not sentenced to additional time, you just have good time taken away from you?

A. You have good time taken away from you, right.

The Court: And you claim that good time is being taken away from you without due process of law?

A. Without due process.

The Court: That is your first complaint. Now, what is your second complaint?

A. The second complaint is with the legal services as they are now.

The Court: You think that if you want to go to see John Doe down there to help you with a case, [Page 78] you ought to have the right to do so?

A. I think that everybody in the Nebraska Penal Complex if he has a legal problem should be able to ask legal advice to find the best way out. As it is now, and I am very far from being a good legal advisor, and I would like to pass off people who ask me for advice.

The Court: Are there any lawyers in the penitentiary down there?

Mr. Kammerlohr: I don't believe there are now, Your Honor. There have been.

The Court: Off the record.

(Colloquy between counsel and the Court)

The Court: Of course, you know we have rules about practicing law, too?

A. Yes.

The Court: So it has to be someone that is fairly intelligent who has prepared themselves and with 900 inmates the warden could not designate 50 men to be legal advisors.

A. Right.

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[Vol. II, 88:4-89:13]

[Page 88] The Court: Do you know that since 1983, The Civil Rights Amendment, was passed, do you know that the cases out of the penitentiary have increased over 400 per cent? We are getting to the point where even the prisoners can't get hearings. You have had a case on file since July 1, 1970.

A. That is right.

The Court: You have had two hearings, one down in front of Judge Urbom's court and one up here.

A. Yes.

The Court: So you can't object to the legal process. We are trying to do a job.

I know that you work for the benefit of yourself. I get up at 6:00 every morning and I am down here by 7:30 and I work many nights until midnight or maybe 1:00 or 2:00 o'clock trying to get this job done because I feel I owe a responsibility and I think you, as an inmate, in trying to rehabilitate yourself so you can be a good citizen have a responsibility if you want [Page 89] to claim privileges under the constitution which you are entitled to. You don't lose your constitutional rights when you go to the penitentiary, but you have some responsibilities, too, and that is why I am saying to all of you here, I am perfectly willing to sit here and listen to this case but

I think the things that this man has told me here should be able to be worked out, and, Mr. Wolff, I compliment you, I think you are doing a good job in trying to make some changes and I think you feel that way, too.

A. I think he is.

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(Title omitted in printing)

TESTIMONY OF CHARLES WOLFF

[Vol. II, 92:9-96:18]

[Page 92] Q. What is your position, Mr. Wolff?

A. Warden at the Nebraska Penal and Correctional Complex.

Q. And when did you take over the job of warden?

A. July 16, 1971.

Q. Just to clear up one point here earlier, has the plaintiff, Mr. McDonnell, been before the Disciplinary Committee since you have been warden to lose good time?

A. No, he has not.

Q. So what he has testified here earlier about losing good time and the procedures therein had nothing to do with since you have been warden?

A. That is correct.

Q. All right, Warden, would you explain to us now, under your administration since you have been warden, what happens when a man is written up or charged with a prison violation?

[Page 93] A. Well, he is normally written up by an employe for rule infraction and that rule infraction is forwarded to the office of the Chief Correction Supervisor who reviews these each day because in this area where a man is written up the individual inmate is called

up and he is also called up during the time the supervisor is in there, or employe I guess I should say that has written him up. They discuss this matter with each other and the Chief Correction Supervisor and this is reviewed at that time as to the severity of the offense, the circumstances involved, the thinking of both parties, and this information is also noted as part of the investigation in the misconduct report and this is sent to the Adjustment Committee. The Adjustment Committee then calls the individual up—

Q. The inmate?

A. The inmate, either that day or the following day or as soon after the investigation has been completed as is possible he is brought in before a three-man committee that normally consists of the Associate Warden for Custody, the Superintendent of Industries, and either a counselor or the Director of the Reception and Diagnostic Center. [Page 94] At this time the individual is apprised of the misconduct report. It is read to him and discussed. He is given an opportunity to talk and then upon conclusion, the Adjustment Committee has him leave the office or room and at that time they come to a decision in terms of what the penalties are going to be. That can be held in abeyance. It can be with a verbal reprimand. It can be removal of good time, placed on restriction, and if there is a major or serious offense the decision could involve going to the Adjustment Center and being placed on a restricted diet and this is the way it is handled.

Q. When the matter is before the investigating officer, suppose the inmate denies the charge, is he allowed to examine the guard that put him on report, for example?

A. Well, he is allowed to ask the individual that has written him up questions, and they talk about it, and normally during the investigation, the things are resolved. Sometimes it is necessary for the investigating officer to go forward. Maybe he has to contact additional employes, or even additional inmates, to try to get it re-

solved and determine the actual circumstances surrounding [Page 95] the incident.

Q. All right, suppose that it gets up before the committee and the inmate is brought in and he still denies he was guilty of this offense?

A. Well, at that point in time after the committee has reviewed the facts, the investigation information and the original write-up, and they have talked to the inmate, then it is the responsibility of the committee to do one of two things, conduct additional investigation if there are any gray areas that are not understood or to make a decision based on the facts they have available if they feel this is adequate.

Q. Do you ever bring the accuser up there before the committee?

A. He has been, on occasion, more than anything else now, with the Chief Correction Supervisor bringing the individual that initiated the misconduct report and the inmate together, the major portion of these things are resolved at that point, namely, the misconduct reports do not go on to the committee and are held at that point and there is no action taken once it is resolved to the mutual agreement of the inmate and the officer himself.

Q. Do you have any idea of the percentage of them that [Page 96] are just out and out not resolved, in other words one side says one thing and the other side says something else? Do you have to decide who is telling the truth?

A. Not very many, quite frankly, the inmates even when they are wrong in the most part will admit their guilt in something that they are involved in and these things are resolved between the supervisor, the inmate and the investigating officer. In most cases, this is what happens. There are some cases that are, some cases that must go on, and there are some, a very small number, that require additional investigation and there are some cases that only the Adjustment Committee can resolve,

and after they have conducted the hearing, then they can make a decision on it. These are a small number, though, a very small percentage.

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[Vol. II, 102:25-109:16]

[Page 102] Q. Now, I would like to go into the Disciplinary Committee [Page 103] proceedings a little, and to do that I believe you brought the file for Douglas Rhodes and at my request you were kind enough to do so without a subpoena?

A. Right.

Mr. Duchek: Could I bring that up to him, please? May I approach the witness?

The Court: You may.

Q. I think that by 11-12 of this year the new procedures were—that is November 12th of this year—they were in effect, so, to the best of my knowledge, when you were directing Mr. Lyons to cooperate with you when he was written up on November 12th, there should be one of these new reports in the file regarding the disposition taken toward him, one of the write-ups that involved the procedures now in effect, is that right?

A. Right.

Q. And so that would have the new form in there or —well, when the new procedure went into effect, the forms available for writing up an inmate were expanded, were they not, to allow for more investigation, is that correct?

A. Correct.

Mr. Duchek: I would like to put one of those forms now being used into evidence so the Court can [Page 104] see the size of the form and the nature of the investigation that goes on.

The Court: Do you have copies?

Mr. Duchek: No, I don't. I was not allowed to have the file without a court order, but now that we are in court—

The Court: Mr. Wolff, could you send the Court one of those forms?

Mr. Wolff: I certainly will.

The Court: Let the record show that the Warden will furnish a copy of the form to this Court which will be made a part of the record and will be designated as Exhibit Number 6.

Mr. Kammerlohr: It is the new form he is referring to, isn't it?

The Court: Yes.

Mr. Kammerlohr: The new rules didn't go into effect until April 1st which is after the time he is speaking about.

Mr. Duchek: I thought it was November 12th of this year.

Mr. Wolff: He is talking about November 12, 1971, which is the date of this incident here.

The Court: Do you have any objection to this Exhibit Number 6?

[Page 105] Mr. Duchek: No, may I have a copy of that?

The Court: Yes and send Mr. Duchek a copy.

Mr. Wolff: Certainly.

Q. (By Mr. Duchek) As I understood your testimony, Warden, there are two phases, there is the investigation phase and that involves the person doing the write-up and also the inmate who is charged with something specific and they do get together and conceivably they talk about it and the man doing the accusation and also the person accused, is that right?

A. That is correct.

Q. And then we have the committee hearing. The report comes in but the officer that did the writing up is not in front of the committee at that time, is that correct?

A. That is correct.

Q. So that the only real confrontation comes in the investigation stage, and now you used the word "guilt" you said that oftentimes an inmate admits his guilt and that has the sound of an adversarial or criminal type setting.

A. They meet in the Adjustment Committee.

Q. What is the purpose of the Adjustment Committee, what is it?

A. The primary responsibility of the Adjustment [Page 106] Committee is to maintain discipline within the Nebraska Penal Complex. It is as much as possible those individuals that are responsible for being involved in rule infractions that are not properly handled by administrative proceedings in terms of discipline, in order to maintain the institutional routine and the proper discipline of the occupants.

Q. Would you characterize it as part of the rehabilitative process or part of the criminal process?

A. This part of the discipline.

Q. And so it does have what we call in the Anglo-American legal system criminal overtones in that there are reprimands taken against the person. You don't regard it as rehabilitative in nature necessarily, do you?

A. Yes, I do, much as I would a child or anybody else that was in a society. There is no difference, I think that the approach to discipline does not have to be of a derogatory nature in any area like this. I think discipline can be handled as long as it is handled constructively and intelligently, it can have a rehabilitative effect.

Q. What would be your objection to giving an inmate anywhere from 24 to 48 hours notice on a write-up that he is going to have to answer to prior to the time of [Page 107] his appearing before the committee?

A. I think that essentially now that is precisely what we have given.

Q. You mean through the investigation?

A. Through the investigation, he knows at least 24 hours ahead of time that he is going in front of the committee.

Q. Does he receive any kind of formal delineation of the exact charge that he will have to answer to?

A. It is read to him.

Q. By the investigating officer?

A. Right, and it is reviewed with him because it is the individual's right to know.

Q. Now does he know when it is read to him that he was definitely going to be called up before the committee or does he find out if he is going to be called up before the Adjustment Committee the very night that he is actually called?

A. No, he is told, if he is going to be called up before the Adjustment Committee or that the particular conduct report is not going to have any action taken, he is told one way or the other.

Q. During the investigation?

A. Right, at the termination of the investigation.

Q. Well, since it is your policy in the investigative [Page 108] stage to give them a chance to answer initially, would you have reservations about giving them a 24 to a 48 hour notice in writing of what they are going to have to answer to and then also having the person that did the writing up there to be before the committee, the committee that finds the guilt so they can interview each

one personally, because in a criminal setting, we let the jury see both the accuser and the accused?

A. Well, we are getting into a—we are getting into an awfully complex area of time elements in our discussions here and I would like to consider that. What you are saying is not all wrong, but sitting here on this stand today I won't be able to give you an answer.

Q. Yes, I won't expect you to do that. But if we did come forward with a plan like the one that was recently suggested in the Maryland District Court, I presume you would be willing to consider it at least and it did provide for some more adversarial situation?

A. Yes, I would consider it.

Q. (Continuing) In front of the committee itself?

A. It is used in some parts of Illinois.

Q. And they have a little bit more adversarial situation, I don't believe they allow lawyers necessarily, but [Page 109] they do at least bring the accuser into the room with the accused and let the committee see them there.

Mr. Kammerlohr: Your Honor, I am sure Mr. Wolff would be willing to consider any suggestion they might offer, but I do object to the implication that someone is sitting over the prison administration monitoring everything they are doing unless constitutional rights are actually involved, and thus far I don't think there has been any evidence of any constitutional rights being involved as far as the disciplinary committee is concerned.

The Court: All right, we have got this much evidence in and I think that is as far as we will go into this. Take up your next line of questioning.

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[Vol. II, 110:8-10]

[Page 110] Mr. Duchek: I will inform the Court that a large percentage of them are directed toward the Adjustment Committee and the good time procedures.

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[Vol. II, 114:18-116:5]

[Page 114] Q. Do you stop mail coming from either courts or lawyers?

A. No.

Q. You do open it?

A. We do open it.

Q. But you don't stop it?

A. We open it. We inspect it. Predominantly, the consideration of censorship is the control of contraband in and out of institutions such as [Page 115] drugs and items of this nature. This is specifically why we concern ourselves with the mail.

Q. And it would be possible for, say, one thin sheet of paper to carry a saturation of drugs on it?

A. It will carry enough LSD to kill a man.

The Court: Do you know of any situation, whether it has been a letter to a judge or from a judge or a letter to a lawyer or from a lawyer that has not been delivered or refused delivery either to or from an addressee or an addressor?

A. I have no knowledge of any not being delivered or received.

The Court: During the time you have been with the Penal Complex?

A. That is correct.

Mr. Duchek: Your Honor, the stipulation which we entered into describes in the very first paragraph the mailing procedures prior to October of 1970, and I think they have just slipped the witness' mind. There was a situation where mail would not be forwarded to a judge under the old rule as they stipulated to them but as we understand it since October 28th of 1970, that is no longer the case.

[Page 116] A. This is correct. At that time, as I understand it all those—this was on a situation that involves Mr. Jones directly and he will clarify that for you. He has the direct knowledge of anything in this area. I do not.

(Title omitted in printing)

TESTIMONY OF RONALD B. JONES

[Vol. II, 139:2-18]

[Page 139] Q. From your knowledge of the mail procedures how complicated would it be to have an inmate present in the room when a letter from an attorney or a Judge to an inmate is opened?

A. How complicated?

Q. Yes?

A. I believe you have got a security risk when you do that.

Q. And that is just in moving of the inmate to a particular room where it is to be opened? Is that the security risk or what is the security risk?

A. If you put an inmate in the mail room?

Q. No, it would have to be a different room?

A. Only the time element, I would hope we have got some other things to do in the institution except that type of thing, a little administration, we hope.

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(Title omitted in printing)

STATEMENTS BY THE COURT

[Vol. II, 146:6-147:8]

[Page 146]

But this business about "process", the Courts more and more are going to the procedural aspect of every person, no matter what their situation they find themselves in are entitled to due process, and Mr. Wolff, as Warden, it would seem to me that you are trying to establish process that you have mimeographed machines that you can send out these forms and you can serve a copy on the prisoner 24 hours before he is to come up, at least this man testified to this Court today that he was handed a notice at 5:00 o'clock that he had to appear before the Adjustment Committee and he walked in there and said, "What's the story?" and he told them he wasn't guilty and that is it. Well, of course, there are two sides to everything, but if there is any possibility—I don't want you to run a judicial trial, but if you can let him know what he is charged with, give him an opportunity to tell you what he thinks are the true facts, and also the person who puts him on [Page 147] report, if you can have them present to tell the true story, it seems to me that that is the fair, American way to do it and I have a strong feeling that there are certain responsibilities on these prisoners, and I am not going to run your penitentiary for you, but I know in reading, and I read constantly, that a lot of the problems such as Attica and places like that where they have prisoner rebellions, it is just little things, and if you can work out these little things, you will have a much more satisfactory regime down there. They are still human beings and our first job is to rehabilitate them. Our second job is to deter others from committing the same crime. We are not a vindictive type of government. They have done a wrong. They must pay the penalty, but they are still human beings. Keep that in mind all the time.

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The District Court summarized the testimony of inmates of the Nebraska Penal and Correctional Complex in its opinion. However, the following affidavits are included in full as illustrative of such testimony.

[Vol. II, p. 143—Affidavits received]

AFFIDAVIT OF DAVID L. RICE

On several occasions I have received unmailed letters to my attorney back from the mail room with slips attached informing me that my attorney (David Herzog) is not on my mailing and visiting list. These letters were often held up three or four days before I would get them back with the "not on authorized mailing and visiting list." These kind of letters served to prevent me from communicating with my attorney certain requests, etc. that had needed to be dealt with in a particular span of time. I believe this action, and other similar ones, were attempts on the part of administration to harass me because of my race and my political beliefs.

/s/ David L. Rice
27768

(Jurat omitted in printing.)

AFFIDAVIT OF DAVID L. RICE

On Monday, November 16, '7', I received notice that I was deleted from the gavel club roster for not standing up for the pledge of allegiance and invocation at gavel club meetings. In a period of approximately two months, the following inmates were deleted: Larry Woods, Bobby Maxwell, Charles Marion, Ad Strong; all for not standing for the pledge of allegiance and (or) invocation. Another inmate deleted is Lawrence Coran, for criticizing the gavel club sponsor. I have reason to believe that the deletion of these inmates was an attempt to stifle the rapidly increasing growth of gavel club's black membership. I fur-

ther understand that the person responsible for directing the gavel club sponsor to make these deletions is Scott Miller, the associate warden. There is nothing in the gavel club constitution, policy, or by-laws that makes standing for the pledge of allegiance mandatory. And, further, the governing rules of gavel club do not provide that anyone outside of the gavel club membership can oust a gavel club member. As a matter of fact, the gavel club's rules state that a member is to be expelled by a majority vote of its members. Scott Miller is not a member of gavel club, nor is the sponsor of gavel club. I feel, as do parties similarly affected by the above mentioned deletions, that Scott Miller is acting both with racism and with no legal foundation for such action.

/s/ David L. Rice
27768

(Jurat omitted in printing.)

AFFIDAVIT OF DAVID L. RICE

It was in (I believe) the month of June ('71) that I was sent to the adjustment center for "refusing a direct order to work." During the proceedings, I requested to produce witness to show that I had not refused to work. This request of mine was denied by the adjustment committee. Nor was I faced by my accuser, shop foreman Gillespie. I also lost a number of days good time. I spent 5 days in the "hole".

/s/ David L. Rice

Shortly after I was released from the adjustment center, I was brought before the adjustment committee again. This time the "infraction" was "refusal to work" again. I had been accused by foreman Gillespie. When a check to the hospital showed that my "refusal to work" had actually been a "lay-in" by the hospital, resulting from an injured leg; the incident report was held in abeyance.

I believe that the incident report since it had not been supported by evidence, should have not been held in abeyance to be used as a future weapon. I believe it should have been destroyed.

/s/ David L. Rice
27768

(Jurat omitted in printing.)

AFFIDAVIT OF DAVID L. RICE

I am being repeatedly harrassed (sic) by the institution, specifically Mrs. Hubble and another woman, who are responsible for checking in the women visitors. The harrassment (sic) takes place in the form of my woman visitor (Anna Dahlin, who is white) having to be interrogated as to the kind of underwear she is wearing, whether or not she is wearing a slip, etc. She purposely wears long ("maxi") dresses in order not to be harangued. On one occasion, about 3 months ago, she wore a skirt that hung about 2 inches above the knee and was told in a very rude manner that the next time she would wear such a skirt, she would be required to leave. Now it so happens that I have commonly seen female visitors of inmates wear skin-tight pants and dresses and skirts that expose the thighs of the wearers, even while they are in a standing position. I have every reason to believe I am being harrassed (sic), through the mistreatment of my woman. Because of the facts that I am black while she is white and that I am a prisoner who has been labeled a "militant (political prisoner)."

/s/ David L. Rice
27768

(Jurat omitted in printing.)

AFFIDAVIT OF DAVID L. RICE

Shortly after I arrived into the institution, the mailing and visiting privilege was increased from 2 visits per month to 3 a month and outgoing letters from six per week to an unlimited number per week. When the administration first informed the population of this change, the impression was given that the change was a matter of *policy*. Yet, on the first occasion I was sent to the adjustment center I was told at the hearing before the adjustment committee that the increased visiting and mailing was not policy, but a *bonus*. I was told that I was to lose my "bonus" of the "extra" visit and would be placed back on the six outgoing letters per week. Also, I was informed that the *policy* was to take away this "bonus" for a period of *one year*, even though another inmate had his "bonus" taken away for *six months*. This matter occurred on or about the 25th of June and I wrote a grievance report on the 28th of July, but no action has been taken.

/s/ David L. Rice
27768

(Jurat omitted in printing.)

AFFIDAVIT OF DAVID L. RICE

Since I came to this institution in April, I have been requesting that I be able to teach English in the prison school. And I have repeatedly denied this request by Edith Whiting (Dir. of Education), Warden Wolff, and the sub-classification committee. I have been told by Edith Whiting that I will not be allowed to teach in the school because of my "attitude" and because of my philosophy. I have been told the same by Warden Wolff.

I feel that, since I scored 143 in verbal aptitude, 120 in intelligence, 136 in form perception, and 136 in clerical perception, that there is little doubt that I have sufficient

English skills to be tried, at least, as a teacher. The above scores are from the general aptitude test battery, which I took while I was in the reception and diagnostic center. In the California achievement test I scored 14.4 in reading (2.4 yr. in college), 15.3 in language (3.3 yr. in college). Whereas it is true that my one year of college was not productive gradewise, I have since been published in several periodicals, newspapers, literary magazines, etc. I believe, everything as it is, that I am being discriminated against in employment by Warden Wolff and Edith Whiting because of my political advocacy.

/s/ David L. Rice
27768

(Jurat omitted in printing.)

AFFIDAVIT OF DAVID L. RICE

I have been harrassed (sic) by prison officials, in the form of these incident reports, several times. At none of these resulting meetings with the "investigator (Captain Nance)" or with the adjustment committee was I allowed to present witnesses in my behalf. At none of these times (but once, when the Warden himself was the author of that particular incident report) was I afforded the courtesy of peing faced by my accusor.

Also, of all the times I have been "written up" (9 times as I recall) I have never been informed of such a "write-up (incident report)" prior to going up for "investigation" by Captain Nance or to a proceeding of the adjustment committee. Also, it is my *understand* that, though only three of these nine alleged infractions were acted upon, the others are yet being held in *abeyance.*

/s/ David L. Rice
27768

(Jurat omitted in printing.)

AFFIDAVIT OF DAVID L. RICE

On Sept. 8, '71, I was sent to the adjustment center by the adjustment committee and the warden. The "infraction" that was behind my going before the committee was "refusing the warden's direct order to get a haircut." When, during the proceedings, I showed very clearly that I had gotten a haircut, the warden (Wolff) said, "I'm not satisfied with your haircut." I spent 43 consecutive days without being allowed outside for exercise. From September 20th, I was placed in the "dry cell." I remained there for 12 days; during which time I was refused my legal papers. And, also, I *lossed* some days good time.

/s/ David L. Rice
27768

(Jurat omitted in printing.)

AFFIDAVIT OF DANNY HART

On Feb. 8th, 1971 I was held in solitary for almost three weeks without being allowed to contact my court appointed attorney by holding me incommunicato (sic) the warden denied me a chance to prepare my defense against the escape charges against me. This is a matter of court record in the State v. Hart, Hastings, Nebr. Judge Fred Irons.

On or about March 22, 1971 all of my mailing and visiting was ordered stopped because of the fact that I had allegedly mailed letters to the World Herald and Sen. Ernest Chambers. With the prison making no explanation to my family or friends why they could no longer contact me or I them.

I was placed in "solitary" for over a month due to the fact that the warden accused me of organizing a protest against him. Though he never produced any other conspirators, thus he placed me in solitary for something that never took place.

I have been and still am denied the right to write to the U. S. Senator from my native state, Sen. Jack Miller.

/s/ Danny Hart

(Jurat omitted in printing.)

The opinion of the United States District Court for the District of Nebraska is found at Petition for Writ of Certiorari, App. 15-47, inclusive.

The opinion of the United States Court of Appeals for the Eighth Circuit is found at Petition for Writ of Certiorari, App. 1-14, inclusive, and App. 49-50, inclusive.

[Vol. V, p. 14] JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1972

No. 72-1331

Robert O. McDonnell, etc.,

Appellant,

vs.

Charles L. Wolff, Jr., etc., et al.,

Appellees,

No. 72-1332

Robert O. McDonnell, etc.,

Appellee,

vs.

Charles L. Wolff, Jr., etc., et al.,

Appellants.

Appeals from the United States District Court
for the District of Nebraska

These Causes came on to be heard on the record from the United States District Court for the District of Nebraska and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court of April 21, 1972, in these causes, be, and the same are hereby, affirmed in part and reversed in part.

And it is further ordered by this Court that these causes be, and they are hereby, remanded to the said District Court for action consistent with the opinion of this Court this day filed herein.

August 2, 1973

Supreme Court, U.
FILED
OCT 23 1973
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

vs.

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

vs.

ROBERT O. McDONNELL, individully and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RESPONSE NOT PRINTED

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IN THE

Supreme Court of the United States

No. .....

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

vs.

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

vs.

ROBERT O. McDONNELL, individully and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on August 2, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals is not yet reported. A copy of such opinion is separately attached hereto in Appendix No. 1.

The opinion of the United States District Court for the District of Nebraska which was affirmed by the United States Court of Appeals for the Eighth Circuit is reported in 342 F. Supp. 616 (D. Neb. 1972), copy of which is attached hereto in Appendix No. 2.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on August 2, 1973. Appendix I. This judgment affirmed the judgment of the United States District Court for the District of Nebraska entered April 21, 1972.

Petition for rehearing and suggestion for rehearing en banc was denied by the United States Court of Appeals for the Eighth Circuit on September 12, 1973, copy of which is set forth in Appendix 3.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances, if any, does procedural due process require the state to furnish counsel or permit retained counsel for inmates in prison disciplinary proceedings?

2. Should the state penal authorities or the federal district court lay down minimum procedural due process requirements for disciplinary hearings in penal institutions in the first instance?

3. Are state prison authorities barred from opening incoming mail from attorneys, if such mail is opened in the presence of the inmate addressee for the sole purpose of inspecting for contraband not otherwise discoverable?

4. Must state penal authorities furnish legal assistance, or a reasonable alternative, to inmates to prepare civil rights actions as well as habeas corpus suits?

5. May the federal courts order newly devised prison procedural requirements to be applied retroactively to prior prison disciplinary proceedings?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(2) Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(3) 42 U. S. C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(4) 42 U. S. C. § 1985:

"(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

"(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on

the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(5) Ninth Amendment, United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(6) Tenth Amendment, United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

Robert O. McDonnell brought this civil rights action on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex alleging that disciplinary proceedings in the Complex were conducted without regard to procedural or substantive due process, that the inmate legal assistance program did not meet constitutional standards and that the regulations regarding inspection of incoming mail from attorneys to inmates were violative of the inmates' constitutional rights.

Prison disciplinary proceedings in the Nebraska Penal and Correctional Complex are conducted without lawyers on either side. The Penal and Correctional Complex had adopted rules and regulations for the conduct of disciplinary proceedings which are set forth in Appendix 2 hereof (Appendix Q of Federal District Court Opinion in 342 F. Supp. 616 at 645).

A lay inmate legal assistant has been appointed by the Warden for the benefit of those offenders in need of legal assistance in the courts. No other inmate other than the legal advisor is permitted to assist other inmates in the preparation of legal documents unless with the specific written permission of the Warden.

The law library itself is open on Monday, Tuesday, Wednesday, Thursday and Friday evenings for independent research by an inmate unassisted by the legal assistant. The law library is open from five p.m. to seven p.m. on Tuesdays and Thursdays and from six p.m. to seven p.m. on Monday, Wednesday and Friday. For security reasons, the number of inmates that may be allowed in

the library at any one time is six. Some inmates have a conflict with school attendance on these evenings.

The district court found that it had examined over fifty petitions in the last twelve months originating in the Penal Complex which were sufficiently drafted to apprise the court of the claim and that in addition the court appoints counsel for 95 percent of all the habeas corpus petitions and most of the civil rights cases where complex, factual allegations are involved including the appointment of counsel in the present case.

The Court of Appeals in the present case in the judgment now questioned ordered that the Federal District Court and not the state authorities should lay down the specific requirements, including the circumstances in which counsel may be required, in prison disciplinary hearings.

The court further held that as to the general inmate legal advisor program the defendants must take into account the need of inmates for assistance in civil rights actions as well as habeas corpus suits. The court further held that there be expunged from prison records, determinations of misconduct arrived at in hearings that failed to comport with the new minimum requirements to be established by the district court. That in cases where the district court determined counsel should have been furnished that the order would be retroactive and the state would be afforded an opportunity to provide counsel on cases which must be reheard for lack of procedural or substantive due process pursuant to that opinion and the state's decision not to provide counsel could be re-

examined by the district court in light of *Scarpelli*. See Appendix 3 relating to rehearing.

The court also held that mail from an attorney to an inmate could not be inspected for contraband absent some exceptional circumstance and that a simple telephone call could be used to ascertain if the letter was actually from an attorney.

The basis for the federal jurisdiction in the first instance was the Civil Rights Act, 42 U. S. C. § 1983 and § 1985.

REASONS FOR ALLOWING THE WRIT

1. Requiring Counsel at Prison Disciplinary Hearings

On page 4 of the current opinion, the Honorable Judge Heaney, after stating that the procedural requirements of *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (revocation of parole), and *Gagnon v. Scarpelli*, (May 14, 1973), — U. S. —, 36 L. Ed. 2d 656, 93 S. Ct. —, (probation revocation), should be generally followed in prison disciplinary proceedings, goes on to direct the district court to make specific requirements when *legal counsel* may be *required* in such proceedings. This is a great extension of both *Morrissey v. Brewer* and *Gagnon v. Scarpelli* and any previous holdings of the United States Supreme Court.

In *Morrissey v. Brewer*, of course, the United States Supreme Court stated as to parole revocations:

"* * *. Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole. * * *."

The Court then specifically stated:

"We do not reach or decide the question whether the parolee is entitled to the *assistance of retained counsel or to appointed counsel* if he is indigent." *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484 at 499. (Emphasis added.)

The United States Supreme Court decided in *Gagnon v. Scarpelli, supra*, that as to probation revocations, the question of right to counsel should be decided upon a case-by-case basis and specifically distinguished such a hearing from a criminal trial, stating:

"In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented not by a prosecutor but by a parole officer with the orien-

> tation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives not from the invariable attributes of those hearings but rather from the peculiarities of particular cases." *Gagnon v. Scarpelli*, — U. S. —, 36 L. Ed. 2d 656 at 665.

The above distinctions are even more true as to disciplinary proceedings in prison. There is no lawyer or prosecutor present for the state and the formal procedures and rules of evidence are certainly not employed.

Judge Heaney cites *Remmers v. Brewer, et al.*, No. 72-1490, (C. A. 8th, Mar. 12, 1973), and *Dodson v. Haugh, et al.*, No. 72-1314, (C. A. 8th, Feb. 14, 1973), for the proposition that the Eighth Circuit has held that minimum procedural due process requirements are applicable to prison disciplinary hearings.

While this is certainly true, neither case extends the requirement to include a right to counsel.

In view of the state of the law as to right to counsel at parole revocation hearings and probation revocation hearings, where the actual freedom of an individual is at stake as compared to the lesser rights involved in prison disciplinary hearings where the conditions of custody of one who has already lost his freedom are involved, and where the hearings are entirely conducted by lay individuals unschooled in the law, not to mention the financial, planning and scheduling impact a requirement of legal counsel for inmates would have in state and federal prisons nationally (and the concomitant problems of

furnishing attorneys for prison officials), we respectfully request this court settle the law on this question as well as the others set forth below. Even if a requirement of counsel would only result in limited use of lawyers, the fact of such a requirement would lead to untold thousands of new civil rights actions in hearings where counsel was denied.

This court is of course well aware of the terrific congestion in the federal courts throughout the Nation, a great percentage of which involves civil rights actions by prison inmates. It would serve no useful purpose at this point for petitioners to attempt to set forth all of the varied rulings by the federal district courts and the courts of appeals concerning notice, hearing, cross-examination and all of the other many issues being litigated in regard to prison disciplinary hearings and mail inspection rules. Much of this congestion, uncertainty, myriad attorney man-hours and expense, etc. etc., could be eliminated by this court's decision to accept certiorari and lay down the constitutional guidelines to be followed in prison disciplinary hearings and mail inspection cases.

2. Who Initially Lays Down Due Process Rules in Prison Discipline Hearings?

The Honorable Court of Appeals, in its opinion in the present case, also specifically directed the Federal District Court to determine the minimum procedural due process standards in prison disciplinary proceedings. This is in direct opposition to the holdings in both *Morrissey v. Brewer* and *Gagnon v. Scarpelli, supra.* In *Morrissey* the Court stated:

"We cannot write a code of procedure; that is the responsibility of each State. * * *.

"* * *.

"We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. * * *." *Morrissey v. Brewer*, 33 L. Ed. 2d 484 at 498, 499.

In light of the foregoing, we urge the Court to reconsider whether standards set forth in *Morrissey v. Brewer, supra,* must generally be followed in prison disciplinary proceedings, or if something less is required, and whether the state authorities should first be given an opportunity to meet these guidelines in the first instance rather than the Federal District Court imposing its rules.

3. Inspection of Incoming Attorney—Inmate Mail

The Honorable Court of Appeals at page 12 of its opinion in the present case states that a simple telephone call is enough to ascertain whether a letter is from an attorney and that the danger that an attorney would send contraband is too remote to justify permitting inspection of legal mail.

Frequently attorneys corresponding with inmates are attorneys practicing in remote cities in other states or with civil rights organizations located hundreds of miles from the Penal Complex. A telephone call would not be a simple matter and could become a very expensive matter. This would even be more true if this holding

were applied to the federal prison system, as it surely would be in the Eighth Circuit.

Even though the court indicates it would permit inspection in the presence of the inmate in appropriate circumstances, the local prison authorities would have no way of knowing whether or not there was danger that a letter contained money or other contraband not ascertainable without opening if the letter came from an attorney located a long distance from the Penal Complex and whose background and reputation is a complete mystery to the penal authorities.

In both of the above instances it would be much simpler for the penal authorities to be permitted to open said mail in the presence of the inmate addressee. Otherwise, the contraband may get in and the damage be done before the prison authorities are aware of it; subsequent censure of the attorney may be difficult to prove and at any rate would not cure the damage that had been done at the Penal Complex. The Court of Appeals in the present case at page 13 recognized a conflict with other circuits stating:

> "We recognize that some courts, see e. g., Sostre v. McGinnis, 442 F. 2d 178, 201 (2nd Cir., 1971), cert. den., sub. nom., Sostre v. Oswald, 404 U. S. 1049 (1972), have held that prison authorities have the right to open and read incoming mail from attorneys."

The present opinion is also in conflict with the First Circuit case of *Smith v. Robbins,* 454 F. 2d 696, which affirmed the Federal District Court to the extent that prison officials may inspect mail from attorneys for con-

traband in the presence of the inmate addressee so long as the said mail is not read which is all that is contended for in the present case.

4. Is Legal Assistance Required to be Furnished by the State for Inmates to Prepare Civil Rights Actions Against the State?

The case from the United States Supreme Court which started the basic guidelines for giving legal assistance to an inmate is, of course, *Johnson v. Avery,* 393 U. S. 483, 21 L. Ed. 718, 89 S. Ct. 747.

It stands for two propositions: 1. It applies only to preparation of petitions for post conviction relief—it has nothing to do with civil rights actions. 2. The prisons may either allow fellow prisoners to assist one another in the preparation of post conviction relief or if they wish to bar or regulate this, they may provide a reasonable alternative.

The court in the present case cited *Nolan v. Scafati,* 430 F. 2d 548 (1st Cir., 1970). The court in *Scafati* recognized that *Johnson v. Avery* only specifically used the language of habeas corpus cases but stated that it could see no sound basis for putting a writ of habeas corpus on a higher plan than inmate civil rights cases. What the court failed to recognize in quoting from the *Scafati* case was that that case did not involve inmate legal assistance but mailings to attorneys. There may be no difference in permitting mailings to attorneys in either civil rights cases, habeas corpus cases or any other legal matter, as this involves no extra security risk or expense to the prison; however, inmate writ writing for other

inmates or furnishing additional legal assistants involves both security and expense to the prison. This is an example again of the Courts of Appeals extending the United States Supreme Court holdings and the need for clarification by this court.

5. May the Federal Court Order Newly Devised Prison Procedural Requirements to be Applied Retroactively?

The Court of Appeals in the instant case on page 7 of its opinion stated that it would appropriate for the district court to order expunged from prison records determinations of misconduct arrived at in hearings that failed to comport with minimum due process requirements. Appendix 2.

In its order denying a rehearing the court went on to state that prison authorities would be given an opportunity to state whether they will provide or permit counsel on those cases which must be reheard for lack of procedural or substantive due process.

Even the Supreme Court of the United States has never ordered newly determined constitutional rights to be applied retroactively to other cases than the case in which the newly determined constitutional rights were established. Thus, the retroactivity of the new search and seizure rules in states not theretofore following the same established in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, was not known until the later case of *Linkletter v. Walker,* 381 U. S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731, nor was the retroactivity of the new

interrogation rules of *Escobedo v. Illinois,* 378 U. S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, and *Miranda v. Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, known until the later case of *Johnson v. New Jersey,* 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772.

So in the present case if new procedural rules are to be established for holding prison disciplinary hearings, said rules at least should not be made to apply except to hearings after the date of the case in which they were established or until another case is had where the question of retroactivity is specifically litigated.

Counsel has just been informed that the U. S. Court of Appeals for the Seventh Circuit on August 23, 1973, in case of *Adams v. Carlson* also decided a prison case involving the question of retroactivity but have not been able to procure a copy in time for this petition.

Respectfully submitted,

CLARENCE A. H. MEYER,
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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1331

Robert O. McDonnell, etc.,
Appellant.

v.

Charles L. Wolff, Jr., etc., et al.,
Appellees.

No. 72-1332

Robert O. McDonnell, etc.,
Appellee,

v.

Charles L. Wolff, Jr., etc., et al.,
Appellants.

Appeals from the United States District Court for the District of Nebraska.

Submitted: January 9, 1973.
Filed: August 2, 1973.

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

Robert O. McDonnell brought this civil rights action on behalf of himself and other inmates of the Nebraska Penal

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and Correctional Complex. He alleged that disciplinary proceedings in the Complex were conducted without regard for procedural or substantive due process, that the inmate legal assistance program did not meet constitutional standards, and that the regulations regarding prisoners' mail were violative of the inmates' constitutional rights.

The trial court, relying on our decision in *Morrissey* v. *Brewer*, 443 F.2d 942 (8th Cir. 1971), held that the Complex was not required to afford procedural due process to inmates in disciplinary hearings, but that it was required to afford substantive due process to inmates. It also held that a rule limiting legal assistance to help, which could be provided by a designated inmate, was reasonable and valid; but that a rule limiting the use of the library to seven hours per week was impermissible, and that a regulation requiring that *all* incoming and outgoing mail be read and inspected was improper.[1]

McDonnell and the defendants appeal. McDonnell contends the trial court erred in holding that minimum due process requirements were not applicable to prison disciplinary hearings, and that the inmate legal assistance program met constitutional standards. The defendants contend that substantive due process was unavailable to inmates, and that the court erred in striking down the prison regulations with respect to the use of the prison library and mail censorship.

I. *Due Process*

The District Court reluctantly relied on our *Morrissey* v. *Brewer* decision, in holding that procedural due process requirements were not applicable to disciplinary hearings. It stated:

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[1] See, *McDonnell* v. *Wolff*, 342 F.Supp. 616, 640 (D. Neb. 1972).

"Courts have begun in recent years to recognize that fundamental due process is a right of all persons, including inmates, and have specifically held that before good time or other substantial rights may be taken there must be an impartial tribunal, notice, a hearing, a right to cross-examination of adverse witnesses, that the decision be based upon evidence adduced at the hearing, and that the inmate be allowed representation if he so desires. *See, e.g.*, Landman v. Royster, 333 F.Supp. 621 (E.D. Va. 1971).

"However, the Eighth Circuit has not yet followed the trend regarding application of procedural due process to good time revocation, but continues to view the problem in terms of the right/privilege dichotomy that was popular prior to Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) and its progeny. Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967). Such a position was recently affirmed in Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971), which, although the question was then of parole revocation, must be applicable to good time as well. • • •"

McDonnell v. *Wolff*, 342 F.Supp. 616, 627-628 (D. Neb. 1972). It's reluctance was well founded. This Court was reversed by the Supreme Court. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). In light of *Morrissey*, we subsequently held that minimum procedural due process requirements are applicable to prison disciplinary hearings. *Michael E. Remmers* v. *Lou V. Brewer, Warden, et al.*, No. 72-1490 (8th Cir. March 12, 1973); *Harold Dodson, etc.* v. *Charles C. Haugh, etc., et al.*, No. 72-1314 (8th Cir. February 14, 1973).

In view of the developments in the law, subsequent to trial, the defendants no longer contend that inmates are not entitled to minimum due process in disciplinary hearings which may result in the loss of good time, or the im-

position of other substantial penalties. Instead, they argue that existing procedures provide such due process. Under present procedures, inmates are given an informal hearing before an adjustment committee but are not given: (a) notice of the charges in time to prepare a defense; (b) an opportunity to summon, confront or cross-examine witnesses; (c) legal assistance in the presentation of a defense; or (d) a written statement by the fact finders as to the evidence relied on and reasons for the action taken. We find no merit to the argument that existing procedures provide minimum due process.[2]

In our view, the procedural requirements outlined by the Supreme Court in *Morrissey*, and as supplemented by *John R. Gagnon, Warden* v. *Gerald H. Scarpelli*, No. 71-1225 (41 LW 4647, May 14, 1973), should be generally followed. We believe, however, that specific requirements, including the circumstances in which counsel may be required, should be laid down by the District Court after further hearings. See, *Michael E. Remmers* v. *Lou V. Brewer, Warden, et al., supra; Harold Dodson, etc.* v. *Charles C. Haugh, etc., et al., supra.*

The trial court properly held that Fourteenth Amendment substantive due process requirements are applicable to disciplinary proceedings. Even in those earlier cases in which we held procedural due process inapplicable in comparable settings, we recognized that administrative determinations must not be arbitrary. See, *Morrissey* v. *Brewer*, *supra* at 950; *Douglas* v. *Sigler*, 386 F.2d 684, 687 (8th Cir.

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[2] Compare, *Landman* v. *Royster*, 333 F.Supp. 621 (E.D. Va. 1971); *Sostre* v. *Rockefeller*, 312 F.Supp. 863 (S.D. N.Y. 1970), *rev'd in part, modified in part, aff'd in part, sub nom., Sostre* v. *McGinnis*, 442 F.2d 178, 198 (2nd Cir. 1971), *cert. denied sub nom., Sostre* v. *Oswald*, 404 U.S. 1049 (1972). See also, The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, 86 (1967); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners Rights Litigation*, 23 STAN. L. REV. 473, 498-499 (1971).

967). It would serve little purpose to require fair procedures but to permit arbitrary results. The procedures re not ends in themselves, but are a means to insure that decisions imposing substantial penalties will be based on he knowledge that grounds for the imposition of the penalties exist. The courts, therefore, have a limited right o review the merits of decisions imposing substantial penalties. In each case, the sole concern of the court must be whether the decision of the prison authorities is arbitrary and capricious. It must not substitute its judgment for that of the prison authorities.[3]

We believe that the District Court correctly applied the above standard when it held that prison authorities violated the rights of inmates by subjecting them to substantial penalties for relatively minor offenses. Not only was such a revocation contrary to NEB. R. R. S. 1943, §83-185 (1971), but also it was arbitrary and capricious.

It is necessary to digress at this point, to discuss the effect of *Peter Preiser, Commissioner of Correctional Services, et al. v. Eugene Rodriguez, et al.*, 41 U.S.L.W. 4555 (U.S. May 7, 1973),[4] on the disposition of this case. In that case, several prisoners, without exhausting state remedies, brought civil rights actions under 42 U.S.C. §1983 in federal court, arguing that they had been unconstitutionally de-

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[3] See, *Marmin v. Pinzo*, 463 F.2d 583 (3rd Cir. 1972); *Sostre v. McGinnis*, *supra* at 198-199; *United States v. ex rel. Campbell v. Pate*, 401 F.2d 55, 57 (7th Cir. 1968); *Holland v. Oliver*, 350 F.Supp. 485 (E.D. Va. 1972); *Ferrell v. Huffman*, 350 F.Supp. 164 (E.D. Va. 1972). *Cf., Thompson v. Louisville*, 362 U.S. 199, 206 (1960); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *Burns v. United States*, 287 U.S. 216 (1932); *United States ex rel. Vajtauer v. Comr. of Immigration*, 273 U.S. 103, 106 (1927); *Francis Fisher v. James Snyder, et al.*, No. 72-1599 (8th Cir., April 16, 1973).

[4] The parties have, at our request, submitted statements setting forth their views on the effect of *Peter Preiser, Commissioner of Correctional Services, et al. v. Eugene Rodriguez, et al.*, 41 U.S.L.W. 4555 (U.S. May 7, 1973), on this case.

prived of good time; *they sought restoration of that good time.* The Supreme Court held that the relief requested could not be granted in a §1983 action. The Court stated:

> "• • • [W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus. • • • [Moreover, state remedies must be exhausted before coming into federal court if such relief is sought.]"

Id. at 4562.[5]

The Court noted, however, that an inmate retains the right to litigate claims relating to the conditions of his confinement under a §1983 action in federal court without exhausting state remedies.

It follows from *Preiser* that it would be improper for the District Court on remand to restore good time which may have been taken from inmates in proceedings that did not meet the requirements of procedural or substantive due process. A federal court can restore good time only if state remedies have been exhausted.[6]

On the other hand, it will be appropriate for the District Court to establish minimum procedural due process requirements for disciplinary hearings which may result in serious penalties other than loss of good time, such as incarceration in a dry cell or solitary confinement.

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[5] We express no opinion as to whether Nebraska remedies are adequate. We leave this issue to be determined by the District Court on remand. See, *United States of America, ex rel. Luther Miller, etc., et al.* v. *John J. Twomey, Warden, and Peter B. Bensinger, Director, etc., et al.*, Nos. 71-1854, 71-1869, 71-1870, 72-1395, 72-1712, 72-1713, 71-1370 (7th Cir. May 16, 1973).

[6] This means that the District Court must rescind its order requiring prison authorities to restore "blood time" taken from defendants.

It will also be appropriate for the District Court to order expunged from prison records, determinations of misconduct arrived at in hearings that failed to comport with minimum due process requirements.[7] See, NEB. R. R. S. 1943, §83-185 (1971); *McDonnell* v. *Wolff*, *supra* at 640.

We recognize that the above result may mean that the federal courts may often establish minimum due process standards for all types of disciplinary hearings for serious misconduct in state prisons and that there may be simultaneous litigation in state and federal courts, but the Supreme Court anticipated these results would probably occur. *Peter Preiser, Commissioner of Correctional Services, et al.* v. *Eugene Rodriguez, et al.*, *supra* at 4562, n. 14.

To summarize, the District Court must, on remand, determine what procedures are necessary to meet minimum procedural due process standards and whether they are being met. If the defendant is not meeting these standards, the court may grant such declaratory and injunctive relief as it deems necessary, except that it may not restore good time.

We turn next to the questions of whether the Complex's regulations relating to inmate legal assistance and mail censorship are unconstitutional and should be enjoined. These questions clearly relate to conditions of confinement, and thus relief may be granted under §1983.

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[7] Courts have recognized the damaging nature of such a record entry. "• • • [It] may follow him throughout the prison system; if his punishment was without cause, he is punished anew each time his record is used against him. • • • Similarly, his disciplinary record may affect his eligibility for parole. • • •"

Hudson v. *Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970) (Citations and footnote omitted.). See, *Black* v. *Warden, U. S. Penitentiary*, 467 F.2d 202, 204 (10th Cir. 1972).

II. *Inmate Legal Assistance*

The court upheld as reasonable a regulation adopted by the Complex which regulates inmate legal assistance and struck down restrictions which limited inmate use of the law library to seven hours per week.

The plaintiff contends that the court erred in upholding the following rule:

> "*Legal Work*
>
> "A legal advisor has been appointed by the Warden for the benefit of those offenders who are in need of legal assistance. This individual is an offender who has general knowledge of the law procedure. He is not an attorney and can not represent you as such.
>
> "No other offender than the legal advisor is permitted to assist you in the preparation of legal documents unless with the specific written permission of the Warden."

McDonnell v. *Wolff*, *supra* at 631.

He argues that this rule unlawfully restricts the inmate's right of equal access to the courts in violation of the Supreme Court's decision in *Johnson* v. *Avery*, 393 U.S. 483, 490 (1969), in which the Court stated:

> "• • • But unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation • • • barring inmates from furnishing such assistance to other prisoners." (Footnote omitted.)

See also, *Gilmore* v. *Lynch*, 319 F.Supp. 105 (W.D. Cal. 1970) (three judge court), *aff'd per curiam sub nom.*, *Younger* v. *Gilmore*, 404 U.S. 15 (1971).

The District Court in this case held:

"The Court should first examine the inmate assistance program whereby the Complex provides for the use of the inmate legal assistant. This procedure must satisfy the test of Johnson v. Avery, * * *. Here, the Complex allows for inmates to assist each other upon permission of the Warden. Assuming such permission is freely given, then it is certainly arguable that no Johnson v. Avery, *supra*, problem is presented, since the procedure and the alternative both are allowed. But at least it should seem evident, and the Court so finds, that such a regulation in conjunction with the comprehensive program of inmate legal assistance afforded by the Complex satisfies the reasonable alternative requirements of Johnson v. Avery, *supra*. * * *"

McDonnell v. *Wolff*, *supra* at 621.

The record, however, does not support the court's assumption that permission for inmates to assist each other is freely given. Rather, documentary evidence shows that permission has been apparently denied solely because of the existence of the inmate legal advisor. Thus, the inmate legal advisor program must be evaluated on its own to determine whether it is a reasonable alternative under *Johnson* v. *Avery*, *supra*. We do not think we can answer that question on this record; and for that reason, the decision of the trial court must be reversed and remanded with regard to this issue. The burden is on the defendants to demonstrate that they are providing a reasonable alternative. *Johnson* v. *Avery*, *supra* at 489; *Novack* v. *Beto*, 453 F.2d 661, 663-664 (5th Cir. 1971), *cert. denied*, 34 L.Ed.2d 233 (1972). In meeting this burden, the defendants must produce evidence establishing in specific terms *what the need is for legal assistance*, and must show that the state is reasonably meeting that need. This the defendants have not done. Furthermore, in determining the need for legal assistance, the defendants must take into account the need

for assistance in civil rights actions as well as habeas corpus suits. See, *Nolan* v. *Scafati*, 430 F.2d 548, 551 (1st Cir. 1970). See also, *Andrade* v. *Hauck*, 452 F.2d 1071 (5th Cir. 1971).

We note that on oral argument the attorneys for the parties indicated that the inmate legal assistance program at the Complex has been changed and now includes the assistance of law students. We leave it to the trial court to determine whether this program meets the standards outlined above.

The defendants, in their cross-appeal, argue that the court erred in holding unreasonable restrictions which limited inmate use of the legal library to seven hours a week. The defendants rely on *Johnson* v. *Avery*, *supra* at 490, in which the Court stated:

> "• • • [T]he State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities. Cf. Hatfield v. Bailleaux, 290 F.2d 632 (CA 9th Cir. 1961) (sustaining as reasonable regulations on the time and location of prisoner work on their own petitions). • • •"

In this case, however, unlike in *Hatfield* v. *Bailleaux*, *supra*, no justification has been given for limiting the use of the prison library. In *Hatfield*, restrictions were justified because of limited library facilities. In the present case, the District Court found that there is "no evidence that reformatory legal library is not adequate for the needs of the inmates." *McDonnell* v. *Wolff*, *supra* at 622. Thus,

we cannot say that the restrictions on the defendants' right of access to the courts are "justified by the considerations underlying our penal system," *Moore* v. *Ciccone*, 459 F.2d 574, 576 (8th Cir. 1972), and we affirm the District Court in this regard.

III. *Mail Regulations*

The evidence shows that no mail from or to courts or counsel is stopped, but all is opened. *McDonnell* v. *Wolff*, *supra* at 623. The Complex's regulations provide that "all incoming and outgoing mail will be read and inspected." *Id.* at 635.

The District Court found that these practices and regulations unjustifiably abridged the right of inmates to have access to the courts, and ordered:

> "• • • that, regarding censorship of mail between inmates and their attorneys or the Courts, outgoing mail may not be inspected or opened; incoming mail may be opened only if manipulation of the envelope, use of fluoroscopes and metal detectors or other alternate means to opening the envelopes fail to disclose contraband and there is a real possibility that contraband will be included in such mail; in addition, if the envelope from the attorney or Court is marked 'Privileged', it cannot be opened except in the presence of the inmate addressee • • •".

In the present case, the District Court undertook, by taking evidence and making findings, the task of determining the precise manner in which mail is hindered at the Complex, the extent to which this impedes the appellant's asserted rights and the justification offered by the defendants in support of their procedures. Compare, *Moore* v. *Ciccone*, *supra* at 576.

Its order follows the guidelines suggested in *Moore* v. *Ciccone, supra* at 577 (Lay, Heaney, Bright and Ross, JJ, concurring) and is, we think, a proper one. As we indicate in *Moore*, a regulation of the right of inmates to correspond with attorneys is proper "only to the extent 'justified by the considerations underlying our penal system'." *Id.* at 576. The justification for this regulation asserted on appeal is that:

> "Insofar as incoming mail is involved, opening it is the only way such things as drug impregnated stationery, paper money or other type material may be discovered. Obviously, the fact that the envelope has an attorney's name printed on it is no guarantee that it is not fictitious or being used by unauthorized or unscrupulous persons, or even persons under duress."

No justification is given on appeal for restrictions on outgoing mail to attorneys, and it appears that this part of the District Court's order is not disputed. The cases cited and discussed in *Moore* v. *Ciccone, supra* at 578 & n.1, sufficiently meet the objections raised by the defendants to the District Court's order.

Practical methods exist for insuring that incoming mail is actually from an attorney. See, *Marsh* v. *Moore*, 325 F. Supp. 392, 395 (D. Mass. 1971); Gierasch, *Judicial Recognition of Prisoners' Constitutional Rights to Send and Receive Mail*, 76 DICKINSON L. REV. 775, 787-788 (1972). If there is doubt, a simple telephone call should be enough to settle the matter; and the danger that a letter from an attorney, an officer of the court, will contain contraband is ordinarily too remote and too speculative to justify the defendants' regulation permitting the opening and inspection of all legal mail. And the court's order does provide, as we suggested in *Moore*, legitimate means for detecting weapons or escape materials including, in the appropriate

circumstances, opening a letter in the presence of the inmate.

We recognize that some courts, see, *e.g.*, *Sostre* v. *McGinnis*, 442 F.2d 178, 201 (2nd Cir. 1971), *cert. denied sub. nom.*, *Sostre* v. *Oswald*, 404 U.S. 1049 (1972), have held that prison authorities have the right to open and read incoming mail from attorneys. We think such decisions unduly limit an inmate's rights without sufficient justification. Prison authorities must show that the regulation of an inmate's right to send and receive mail furthers a substantial interest, and that the incidental restrictions placed on an inmate's rights are no greater than essential to further that interest. *Cf.*, *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Nolan* v. *Fitzpatrick*, 451 F.2d 545, 548 (1st Cir. 1971); Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L. REV. 87, 94-104 (1971). The District Court's order comports with these principles, and we affirm it in this respect.

The plaintiff argues that the District Court should also have enjoined censorship of mail between inmates and parties other than attorneys and the courts. The District Court held that it was unnecessary to decide this issue at the present time because the plaintiff's attack was directed at censorship between counsel and inmate. We have reviewed the record and conclude that the court was correct in this regard.

Affirmed in part; reversed in part; and remanded for action consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Robert O. McDONNELL, etc., Plaintiff,

v.

Charles WOLFF, Jr., etc., et al., Defendants.

Civ. No. 17221.

United States District Court, D. Nebraska.

April 21, 1972.

Civil rights action challenging many of administrative procedures and practices at Nebraska penal and correction complex. The District Court, Denney, J., held, inter alia, that prison regulation restricting to six the number of inmates in legal library at any one time was reasonable, that prison regulation allowing inmates to visit with inmate legal assistant between hours of 7:00 a. m. and 7:30 p. m. daily was reasonable, that prison regulation allowing total of approximately seven hours per week for independent legal research was unreasonable, and that a prison regulation that allows inmate access to legal library at any time during periods that he has "free time" or recreation periods would be reasonable.

Order accordingly.

1. Prisons ⇐4

Matters of internal prison administration should not be interfered with by federal courts.

2. Prisons ⇐12

So long as courts will either accept hand drafted petitions or prison will have those required to be typed so done, no rights of inmates are infringed by denial of individual use of a typewriter.

3. Prisons ⇐12

Prisoners do not have right to individual use of a typewriter.

4. Constitutional Law ⇐272

Reasonable access to courts by prisoners is a right guaranteed against state action by due process clause of Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

5. Prisons ⇐10

Were prison officials to exact reprisals for exercise of prisoners' rights to access to the courts, such would tend to inhibit prisoners' rights sufficiently to be actionable.

6. Prisons ⇐13

Administrative reprisals against inmates who seek access to the courts will not be tolerated, regardless of how justified they might appear.

7. Prisons ⇐4

Inmate assistance program whereby prison provides for use of inmate legal assistant must be a reasonable alternative to allowing inmates to freely assist each other in preparation of petitions if such a ban is imposed.

8. Prisons ⇐4

System whereby prison allowed inmates to assist each other upon permission of warden and provided a comprehensive program of inmate legal assistance was not constitutionally defective, although improvements could yet be made.

9. Prisons ⇐4

Prison regulations regarding inmate legal assistance for new inmates in reception and diagnostic center amounted to a reasonable restraint during short period of their stay, where detrimental effect, if at all, was in area of delay in seeking postconviction relief, and even that delay was minimal, with regular visits of inmate legal assistant to those persons.

10. Prisons ⇐4

Prison regulation restricting to six the number of inmates in legal library at any one time was reasonable.

11. Prisons ⇐4

Prison regulation allowing inmates to visit with inmate legal assistant between hours of 7:00 a. m. and 7:30 p. m. daily was reasonable.

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12. Prisons ⇐4

Prison regulation allowing total of approximately seven hours per week for independent legal research was unreasonable.

13. Prisons ⇐4

A prison regulation that allows inmate access to legal library at any time during periods that he has "free time" or recreation periods would be reasonable.

14. Reformatories ⇐7

Past procedure of denying inmates in reformatory unit access to legal library was unreasonable on its face.

15. Reformatories ⇐7

Forcing inmate at reformatory unit to use inmate legal assistant would be violative of right to proceed pro se.

16. Prisons ⇐4

So long as inmate legal assistant was available to every requesting inmate in solitary confinement weekly and so long as inmate was not required to wait three weeks or more, procedure was reasonable.

17. Prisons ⇐4

A prison rule that requires all mail to be delivered within 48 hours of receipt at prison is permissible outside limit that prison may delay mail, without violating a right of access to courts; the court cannot condone procedures that would allow prison any longer time to delay where the inmate initiates the mailing.

18. Prisons ⇐15

Fighting and threatening an officer's life would amount to "flagrant or serious misconduct" within Nebraska statute providing that good time may be withheld in cases of assault, escape, attempt to escape or other flagrant or serious misconduct. R.S.Supp.Neb.1969, §§ 83-185(2), 83-1,107.

See publication Words and Phrases for other judicial constructions and definitions.

19. Prisons ⇐15

Messing up the "count up," cussing a guard, bringing a sandwich into the shop, "no socks", "no shave", and failure to have a conforming haircut would not amount to "flagrant or serious misconduct" within Nebraska statute providing that good time may be withheld in cases of assault, escape, attempt to escape or other flagrant or serious misconduct. R.S.Supp.Neb.1969, §§ 83-185(2), 83-1,107.

20. Prisons ⇐15

Such offenses as refusal to work, being on wrong tier, contraband in cell, refusal to change cells when ordered, drunkenness, sniffing, organizing a protest and loitering were in gray area of Nebraska statute providing that good time may be withheld in cases of assault, escape, attempt to escape or other flagrant or serious misconduct, and best left to judgment of the adjustment committee, based on facts of each case. R.S. Supp.Neb.1969, §§ 83-185(2), 83-1,107.

Douglas F. Duchek, Lincoln, Neb., for plaintiff.

Mel Kammerlohr, Lincoln, Neb., for defendants.

MEMORANDUM DECISION

DENNEY, District Judge.

This case is a civil rights action challenging many of the administrative procedures and practices at the Nebraska Penal and Correctional Complex (hereafter Complex). The plaintiff, who is incarcerated at that institution, has been allowed to prosecute the case as a class action on behalf of all inmates of the Complex. Counsel has been appointed for the plaintiff and both parties have furnished excellent briefs of the arguments to the Court.

Pursuant to the pre-trial order, the issues were narrowed, then the parties filed a stipulation of facts as to those is-

sues and, as a result, some of them were resolved in the stipulation itself. Those issues that were handled in that manner are as follows:

1. Prior to October 28, 1970, there were three procedures followed in processing inmate letters to sentencing judges regarding the crediting of "dead time." ("Dead time" is time spent in jail prior to sentence, which would have no effect on the time the inmate must serve unless specially credited to the sentence by the sentencing judge.) The procedures revolved about whether the particular judge had or had not expressed a policy regarding such letters. In some instances, the procedures resulted in the letters being returned to the inmates without being sent to the judge. The parties have stipulated that since October 28, 1970, and in all future cases, all letters addressed to any judge will be mailed out by the Complex. It will be so ordered by the Court.

2. Postage has also been a problem at the Complex. Stamps, because they are negotiable, have by necessity been closely controlled. The parties have agreed that the inmate is given three free stamps per month and that, in addition, he may spend from his earnings up to $30.00 per month on postage, and that the Court should enter an order to that effect. It will be so ordered.

3. The law library at the Complex has also been a constant source of disagreement. It will be discussed in greater detail further in this opinion. The parties do agree that the procedure that allows inmates to check out books and take them to their cells is acceptable to the parties. The parties have also agreed as to general adequateness of the law library in terms of books available except for the Nebraska Statutes, which are not current. See Appendix A for a comprehensive cataloging of that library. Inmates may also purchase books for their own use.

4. Inmates desiring notary service submit an interview request to the Captain's office. Notary service is available at the Complex at 3:00 P.M. on Mondays and Fridays. Emergency notary service is done on a daily basis. The parties agree that this procedure is acceptable and the Court will so order.

[1] To the remaining issues, the parties have made certain stipulations of facts but are not in agreement as to how the issues should be resolved. Evidence has also been taken at two hearings and by affidavit. The Court approaches these problems mindful that matters of internal prison administration should not be interfered with by the federal courts. Lee v. Tahash, 352 F.2d 970 [8th Cir. 1965]. The matters that can be examined by this court in a civil rights action such as this have been succinctly stated as:

> The Court . . . is limited in its inquiry to the question of whether or not the constitutional rights of inmates are being invaded and with whether the Penitentiary itself is unconstitutional. The Court is not judicially concerned with questions which in the last analysis are addressed to legislative and administrative judgment. A practice that may be bad from the standpoint of penology may not necessarily be forbidden by the Constitution. And a prison system that would be excellent from the point of view of a modern prison administrator may not be required by the provisions of the Constitution with which the Court is concerned. Holt v. Sarver, 309 F.Supp. 362 [E.D.Ark.1970].

[2, 3] 5. The parties have stipulated that the inmates are denied the individual use of a typewriter. The inmate legal assistant is permitted to use a typewriter and all legal documents required by the Courts to be typewritten are typed by the inmate legal assistant at the request of the inmate. The Complex will not refuse a request for typing of such required documents. Plaintiff charges that this procedure effectively denies the inmates their rights to adequately pre-

pare legal papers. The Court is not so persuaded. So long as the Courts will either accept hand-drafted petitions or the prison will have those required to be typed so done, no rights of the inmates are infringed. There is no right to the individual use of a typewriter. Williams v. United States Department of Justice, Bureau of Prisons, 433 F.2d 958 [5th Cir. 1970].

[4, 5] 6. The plaintiff contends that because there are reprisals by the prison officials to those inmates who petition the Courts the plaintiff's rights to access to the Courts are infringed. The defendants contend that there are no such reprisals. It has been recognized that reasonable access to the Courts is a right guaranteed against state action by the due process clause of the Fourteenth Amendment. Stiltner v. Rhay, 322 F.2d 314 [9th Cir. 1963]. Were the defendants to exact reprisals for the exercise of that right, this Court would be of the opinion that such would tend to inhibit plaintiff's rights sufficiently to be actionable. Coonts v. Wainwright, 252 F.Supp. 893, 896 [M.D.Fla.1968]. The following is the evidence as it developed as to the existence of such reprisals.

Plaintiff McDonnell testified that he originally was given as a work assignment that of clerk-typist in the reception center but that in May of 1970, on the day after appearing in Federal Court, he was reassigned to the soap factory. Warden Wolff testified that McDonnell was moved to the soap factory for security reasons, there being at that time indications that an escape attempt might be made somewhere in the prison and that McDonnell had an escape record.

Inmate Nykeil stated that he believes that the refusal of the prison authorities to allow him to enroll in college courses at the institution is based on his involvement in this law suit.

[6] Plaintiff also alleges in the petition, but no proof was offered, that Douglas L. Rhodes was transferred from his prison job of clerk-typist for the Associate Warden to the particular laundry room where the laundry is filled with human feces from various State hospitals solely because he complained to this Court and that William M. Pegram was placed in a death row confinement cell solely because Pegram requested Rhodes to assist him in complaining to the Courts. The Court does recognize that the officials at the Complex may well feel justified in taking some sort of administrative action against "writ writers" whom they view as harassing the officials and interfering with the orderly administration of the institution. McDonnell and Rhodes are both well known "writ writers" having many actions of various types pending in the Courts constantly. However, the Court is not convinced that plaintiff herein has met the burden of proving that a widespread procedure of reprisals exists. The allegations regarding Rhodes and Pegram were unproved. There was apparently good reason for McDonnell's transfer at the time it was accomplished and Nykeil's statement is too flimsy a foundation to support the entire verdict sought. The Court would caution the defendants that administrative reprisals against inmates who seek access to the Courts will not be tolerated, regardless of how justified they might appear.

7. The parties have raised and stipulated to several issues regarding legal assistance for inmates in the Complex. When the inmate first arrives at the Complex, he is housed in the Reception and Diagnostic Center for a short time. See Appendix B from the *Inmate Handbook* (Published March, 1970). During this time period, the inmate is not allowed access to the Complex's law library. However, the Complex does order the inmate legal assistant to visit the Center once each week, during which time the legal assistant will help the new inmate with any pending legal action he might have or to begin a new action, if desired. The inmate legal assistant is an inmate who has been appointed by the Complex

to help other inmates in presenting their claims to the Courts. See Appendix C from the Inmate Handbook and Appendix D, affidavit of legal assistant, James Maddox. The inmate legal assistant is the only inmate specifically approved to assist other inmates in the preparation of legal documents without express approval of the Warden. The plaintiff is also not satisfied with the regulations surrounding visits to the inmate legal assistant and the law library itself. Any inmate who has indicated an interest in visiting the legal assistant may do so between the hours of 7:00 A.M. and 7:30 P.M. daily. The law library itself is open on Monday, Tuesday, Wednesday, Thursday and Friday evenings for independent research by an inmate unassisted by the legal assistant. The law library is open from 5:00 P.M. to 7:00 P.M. on Tuesdays and Thursday, and it is open from 6:00 P.M. to 7:00 P.M. on Monday, Wednesday and Friday. See Appendices E and F. An inmate is required to be back in his cell for the 7:30 P.M. lineup. For security reasons, the number of inmates that may be allowed in the library at any one time is six. Some days there are more than six requests, and some days there are less than six requests to visit the law library for independent research.

School is held on some of the same nights that the law library is open for independent research. The school classes are organized into three periods of one hour each, commencing at 5:15 P.M. and ending at 8:15 P.M. There are two classes of inmate students and the inmates' ability to visit the law library for independent research depends upon his classification as a student. Inmates under twenty-one years of age, who do not have a high school diploma, are mandatory students. Inmates over twenty-one years of age or high school graduates are voluntary students. An involuntary student, who is attending the first two periods of school, therefore has a conflict with the hours of the law library and he may be excused from school to visit the law library only upon a showing of need to the warden. A voluntary student may miss two nights of school per week and still remain active in the program without a penalty. Involuntary students normally are able to satisfy their library needs during the daytime with the assistance of the inmate legal assistant.

Finally, the procedure is challenged that denies all inmates of the Reformatory Unit access to the law library. See Appendix G from the *Inmate Handbook* for the distinction between the Reformatory Unit and the general penal Complex. The reformatory inmates are not permitted to go to the Complex unit where the law library is located. Previously, the inmate legal assistant has been ordered to visit the Reformatory unit for one afternoon per week and to stay for a sufficient time to take care of all the reformatory inmates' requests. In addition, a small library is being established at the Reformatory unit. See Appendix D.

Danny Hart stated that he was held in solitary for three weeks in February, 1971, during which time he was not allowed to contact court appointed counsel regarding pending escape charges against him.

Solitary confinement is actually implemented in the Adjustment Center portion of the Complex. See Appendix H for the legal assistance regulations regarding the Adjustment Center.

Some of the inmates have particular reluctance to use the inmate legal assistant. McDonnell testified that he uses the inmate legal assistant but is concerned that some of the information given the legal assistant may be forwarded to the administration of the prison.

There has been a recent change in the individual who is the legal assistant in the Complex unit from James Maddox to Harold Huffman, which seems more satisfactory to the inmates. Maddox is now the legal assistant for the Reformatory unit.

McDonnell further testified that he had violated the prison rule about giving legal assistance to other prisoners but had never been punished for doing so.

[7, 8] The Court should first examine the inmate assistance program whereby the Complex provides for the use of the inmate legal assistant. This procedure must satisfy the test of Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 [1969] of being a reasonable alternative to allowing inmates to freely assist each other in the preparation of petitions if such a ban is imposed. The problem is discussed in Note, Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer, 1968 Duke Law Journal 343. Here, the Complex allows for inmates to assist each other upon permission of the Warden. Assuming such permission is freely given, then it is certainly arguable that no Johnson v. Avery, *supra*, problem is presented, since the procedure and the alternative both are allowed. But at least it should seem evident, and the Court so finds, that such a regulation in conjunction with the comprehensive program of inmate legal assistance afforded by the Complex satisfies the reasonable alternative requirements of Johnson v. Avery, *supra*. This is not to say that improvements cannot yet be made. The Court is of the opinion that some of the suggestions in United States v. Simpson, 141 U.S.App.D.C. 8, 436 F.2d 162 [1970] regarding the use of law students are worthy of consideration by the Complex. Similarly, the voluntary assistance of qualified attorneys, as cited in Novak v. Beto, 453 F.2d 661, [5th Cir. 1971], is a goal to be sought. But the system presently employed by the Complex is not constitutionally defective and no major change is mandated. This Court has examined over 50 petitions in the last 12 months which have originated in the Complex. The Court has found them to be sufficiently drafted to apprise the Court of the inmate's basic claim. Often, the inmate legal assistant prepares a brief to accompany the initial petition, although such is not required, and the Court has found such briefs to be well prepared, with numerous but pertinent legal citations. In addition, the Court appoints counsel for 95% of all the habeas corpus petitions (only those involving purely questions of law are excepted) and most of the civil rights cases where complex, factual allegations are involved. It should be noted that this case itself is of the latter variety, wherein counsel was appointed.

In Johnson v. Avery, *supra*, 393 U.S. at p. 490, 89 S.Ct. at p. 751, the Court also recognized that:

> [T]he State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities.

Thus, the remainder of the restrictions in inmate legal assistance must pass that reasonableness test.

[9] The legal assistance procedure in the Reception and Diagnostic Center does not appear to have resulted in any loss in rights to appeal or to seek post-conviction relief. The detrimental effect, if at all, is in the area of delay in seeking such relief. Even delay is minimal, with the regular visits of the inmate legal assistant to those persons. The Court finds the regulations regarding inmate legal assistance for new inmates in the Reception and Diagnostic Center to be a reasonable restraint, during the short period of their stay, within the meaning of Johnson v. Avery, *supra*.

[10-13] The interest of the Complex in minimizing the security risk in the Complex legal library by restricting to six the number of inmates in the library at any one time, thereby preventing large numbers of inmates from congre-

gating together, sustains the reasonableness of the regulation. The Court also finds that allowing inmates to visit with the inmate legal assistant between the hours of 7:00 A.M. and 7:30 P.M. daily is a reasonable restriction. However, the Court does not find that the hours during which an inmate may do independent research has any relationship in fact to the time required for such efforts. The total of approximately seven hours per week for independent research is unreasonable within the meaning of Johnson v. Avery, *supra*. The defendants will be required to amend the regulation regarding time allowed for independent research. It appears to the Court that a regulation that allows the inmate access to the legal library at any time during the periods that he has "free time" or recreation periods would meet the Johnson v. Avery requirements. This would also solve the problem of conflict with school schedules.

[14, 15] The not too distant past procedure of denying inmates in the Reformatory unit access to the legal library was unreasonable on its face. The right to proceed pro se if the person chooses is fundamental to our legal system. Forcing the inmate at the Reformatory unit to use the inmate legal assistant would be violative of that right. The evidence shows that recently the Reformatory unit acquired its own legal assistant and a small legal library. There being no evidence that the Reformatory unit legal library is not adequate for the needs of the inmates, the Court cannot say that the procedure as it is today is unreasonable.

[16] The Adjustment Center where the solitary confinement is located presents, by its nature, extraordinary problems. The regulations indicate that the inmate legal assistant is available to those inmates as well, but on a weekly basis. So long as this is available to every requesting inmate weekly and that an inmate is not required to wait three weeks or more, as indicated by Inmate Hart's testimony, the Court is inclined to find the procedure reasonable. Unlimited access to other inmates and the legal library would seem to consecrate the purpose and effectiveness of solitary confinement.

8. The parties have raised and stipulated to several issues regarding censorship of mail to and from the inmates at the Complex. On May 19, 1971, Judge Warren Urbom of this District issued a temporary injunction in this case, enjoining defendants during the pendency of this suit from opening any mail from plaintiff's attorney to plaintiff or from plaintiff to plaintiff's attorney. Following that, an extensive hearing to reconsider the motion for temporary injunction was held on April 15, 1971, before Judge Urbom. Then Warden Sigler testified at length, saying that the need for censorship has only one purpose, that of security for the institution. He stated that the mails are used to introduce contraband into the prison and especially narcotics. Drugs may be dissolved in water, dropped onto the paper of the letter, then allowed to dry before mailing. The inmate at the receiving end can recover the narcotic from the paper by using a water solution again or merely eat the paper itself. Escape plans can also be devised with outsiders by the use of the mails, according to Warden Sigler. Insofar as censorship of mail between attorney and client, Warden Sigler stated that it was done because either unscrupulous or naive attorneys might introduce contraband or further escape plans. Defendants, in their brief, further describe this problem as "[p]ersons who are employed by attorneys, or even courts, or are clerking for them may, in exercise of what is commonly known as the 'Don Quixote' complex, in their zeal to change the world, unwittingly or without thinking anything wrong, use the attorneys' or courts' stationery to contact an inmate," John B. Greenholtz, who was a deputy warden for 21 years and is now chairman of the Nebraska Board of Paroles, substantiated Warden Sigler's testi-

mony. Carol Franssen, Drug Investigator for the Nebraska State Patrol, testified as to the detection of drugs that have been impregnated in paper either through visual observation or black light techniques.

Following the hearing, the temporary injunction was withdrawn upon stipulation of the parties that law students would be permitted freely to visit plaintiff and plaintiff would be transported to plaintiff's counsel's law office for consultation when requested during the pendency of this lawsuit.

At this Court's hearing on the matter on November 22, 1971, additional evidence was adduced. Now Warden Wolff further stated that, regarding Inmate Rhodes, he had been written up on the basis of slanderous, derogatory and obscene statements and that no mail from or to courts or counsel is stopped but all is opened.

Associate Warden Jones stated that a letter to anyone outside the approved mailing list must have special approval. He repeated Warden Wolff's testimony regarding the Rhodes' letters. In respect to the delay of McDonnell's mail, Jones testified that the mail that had been delayed a month was caused by unusual circumstances, namely, that McDonnell was out of the institution being tried in South Dakota on another charge. He testified that letters to Judges are not censored but that occasionally he writes on the letter the position of the institution.

The five letters of Inmate Rhodes in question have been examined by the Court. They were written on January 16, and 17, 1971. The letters to *Time Magazine* and to State Senator Ernest Chambers are fairly typical. In the letter to *Time Magazine*, some of the objectional portions included: "in many areas its worse than the publicized conditions in Arkansas prisons"; "the only suggestion of treatment here is the prison's name: Nebraska Penal and Correctional Complex"; "it is headed by Maurice H. Sigler who is so old his thinking is fossilized." In the letter to State Senator Ernest Chambers, the objectionable portions were "I feel it is my right—my duty—to inform the public that all is not well at the Maurice Apartments" and "some of the things I could show you at Sigler's Ghetto would shock your conscience." The Disciplinary Report indicates that the Disciplinary Board imposed as punishment for the writing of the letters that 5 days of extra earned good time be withheld and that Rhodes be placed in administrative segregation for the protection of the individual and the welfare of the institution.

Plaintiff McDonnell stated that certain of his mail has been delayed up to a month in being delivered to him.

Inmate Robert N. Pilgrim stated that he mailed a letter to Judge Van Pelt, of this District, in October of 1970, but that the Judge did not receive it until January, 1971. Earlier that year, Pilgrim received an order from the Dakota County Court, giving Pilgrim ten days in which to answer. Because the order was delayed by prison officials for six days, Pilgrim had but three days to do all the work necessary to answer the letter.

Inmate David Rice stated that on several occasions he has received letters sent to his attorney back from the mail room informing him that his attorney was not on the authorized mailing and visiting list.

Inmate Dennis Marion stated that his mail has been repeatedly tampered with and, as a result, it has taken as much as a month for him to receive some letters; that often when he sends letters out the institution does not send them out nor does he get them back.

Inmate Larry Wayne Powell stated that late in 1968 his grandmother died and that in such cases it is the policy of the institution to allow the inmate to attend the funeral. Powell was not notified of the funeral until approximately one and a half hours prior to the funeral because the letter from home was delayed three days by prison authorities.

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As a result, Powell was not able to attend the funeral.

Inmate Hart stated that on March 22, 1971, all of his mailing and visiting privileges were stopped because he had allegedly mailed letters to the *World Herald* (an Omaha, Nebraska, newspaper) and Nebraska State Senator Ernest Chambers. Hart added that he is and has been denied the right to write to the United States Senator from his native state, namely, Senator Jack Miller of Iowa.

The Complex's regulations on mailing privileges as contained in the *Inmate Handbook* are set out in Appendix I. Additional regulations are to be found in Appendices J and K.

Many Courts have spoken recently on this problem of censorship. The Court of Appeals of the First Circuit recently held that an inmate's First Amendment rights extend to being allowed to correspond with the news media concerning prison matters. Nolan v. Fitzpatrick, 451 F.2d 545 [1st Cir. 1971]. That Court reasoned that:

> [T]he condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable. The argument that the prisoner has the right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear.

As shown in Appendix I, the inmates in Nebraska Penal and Correctional Complex are prevented from writing to the news media about prison conditions. The evidence regarding Inmate Rhodes indicates that any such attempt is met with severe punishment.

In Peck v. Ciccone, 288 F.Supp. 329 [W.D.Mo.1968] the Court recognized that refusal to mail a letter to the Pope of the Catholic Church would violate the inmate's First Amendment religious freedoms. It is questionable for the Complex whether the Pope would be an allowable person on the approved mailing list, since the inmate is allowed to write to only three friends. Friends are defined as "aunts," uncles, nieces, nephews, cousins, in-laws and acquaintances". It is certain that the Pope could not be added to the approved list except during one of the following periods: January 1–5, May 1–5, or September 1–5, since those are the only times when changes can be made. See Appendix I.

The Second Circuit Court of Appeals, in Sostre v. McGinnis, 442 F.2d 178 [2nd Cir. 1971], held that:

> [I]f a communication is properly intended to advance a prisoner's effort to secure redress for alleged abuses, no interest would justify deleting material thought by prison authorities to be irrelevant to the prisoner's complaint. The danger that an official will improperly substitute his judgment for that of the correspondent's then preponderates. For similar reasons, prison officials may not withhold, refuse to mail, or delete material from otherwise protected communications merely because they believe the allegations to be repetitious, false, or malicious.

That Court went on to hold that such protected communications were between an inmate and (a) a court, (b) any public official or agency, or (c) any lawyer.

In Rhem v. McGrath, 326 F.Supp. 681 [S.D.N.Y.1971], the Court examined the censorship regulations of the Manhattan House of Detention and found that there were no restrictions upon outgoing mail.

In Palmigiano v. Travisono, 317 F. Supp. 776 [D.R.I.1970], the Court questioned: "Why should there be any limitation on the number of correspondents except as it may be based on the amount of time available to the inmate for writing letters and the amount of physical space and facilities available?"

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This Court is of the opinion that a relaxation of the Complex's rules on censorship of letters to the news media and public officials and limits on numbers of persons to whom letters can be written would aid in the prevention of that which the Complex fears the most, namely riots. It seems that all too often it is the need and frustration to demonstrate to the outside world their complaints that precipitates such disasters as the Attica riots. Whether such a relaxation is constitutionally mandated as the previous cases indicate, this Court does not at this time need to decide. Herein, the plaintiff has directed his attack at censorship between counsel and the inmate and the recent case of Moore v. Ciccone, 459 F.2d 574 [8th Cir. 1972], decided during the pendency of this case, appears to have settled the matter for this Court.

[17] In that case, the 8th Circuit focused on the right to access to the Courts instead of the inmates' First Amendment rights, although that Court has recognized that inmates have First Amendment rights, Rowland v. Jones, 452 F.2d 1005 [8th Cir. 1971], delineating as the scope of the censorship of mail between inmate and attorney to be as follows: Outgoing mail may not be inspected or opened; incoming mail may be opened only if manipulation of the envelope, use of fluoroscopes and metal detectors or other alternate means to opening the envelope fail to disclose contraband and there is a real possibility that contraband will be included in mail from an attorney; in addition, if the envelope from the attorney is marked "Privileged" it cannot be opened except in the presence of the inmate addressee. That Court further emphasized the importance of immediate delivery of mail. From the evidence submitted herein, this Court is convinced that a rule that requires all mail to be delivered within 48 hours of receipt at the Complex is the permissible outside limit that the Complex may delay mail, without violating the right of access to the Courts. Similarly, the Court cannot condone procedures that would allow the Complex any longer time to delay where the inmate initiates the mailing. Initiate means, in this instance, from the time the letter is sealed by the inmate for mailing. The Complex will be required to modify its regulations regarding censorship of mail to and from attorneys in accordance with Moore v. Ciccone, *supra*, as interpreted by this Court. It is axiomatic that no less can be tolerated for mail to and from the Courts themselves.

9. Lastly, the parties have raised and stipulated to issues regarding the loss of good time at the Complex. The various Nebraska statutory provisions regarding good time are found in Appendices L, M and N. It should be noted that § 83-1,107, Appendix M, makes a distinction between statutory good time which shall be credited and meritorious good time which may be credited. A good discussion of the distinctions between the two types of good time can be found in Sawyer v. Sigler, 320 F.Supp. 690 [D. Neb.1970]. The regulations regarding good time as contained in the *Inmate Handbook* are found in Appendix O. A sampling of the rules for which violations thereof have resulted in the loss of good time can be found in Appendix P. The most recent regulations regarding the Adjustment Committee (the quasi-judicial board that passes on inmate infractions, formerly the Disciplinary Committee) for the penitentiary unit can be found in Appendix Q. There are some very similar regulations in force for the Reformatory unit.

At the hearing that this Court held, the following additional evidence was adduced.

Warden Wolff testified that the procedure used now by the prison in taking away good time is as follows:

(a) The chief correction supervisor reviews the "write-ups" on the inmates by the officers of the Complex daily;

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(b) the convict is called to a conference with the chief correction supervisor and the charging party;

(c) following the conference, a conduct report is sent to the Adjustment Committee;

(d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed;

(e) if the inmate denies charge he may ask questions of the party writing him up;

(f) the Adjustment Committee can conduct additional investigations if it desires;

(g) punishment is imposed.

Warden Wolff stated that only a small number of the write-ups are forwarded to the Adjustment Committee, with most being resolved without action at the lower levels.

Plaintiff McDonnell stated that on occasion he had been called before the disciplinary committee but was not made aware of the charge until after he arrived before the committee.

Inmate Robert Emory stated that he had lost good time for such things as messing up the "count up" (5 days), cussing a guard, and bringing a sandwich into the shop. In none of these instances was Emory taken to the Adjustment Committee for hearing. When Emory has been before the Adjustment Committee the Committee has never failed to have taken good time away.

Inmate James E. Botts stated that in January of 1971 he was taken before the Disciplinary Committee and charged with taking part in an "insurrection" by black inmates. He was found guilty and punished by forfeiting 90 days good time and being placed in segregation for 14 days.

Inmate Ronald Jackson stated that in July and September of 1971 he was charged with cursing an officer and threatening his life, for which Jackson lost 70 days of good time.

Inmate Roger Simons stated that at various times he has had either 5 or 10 days good time taken away for such infractions as "no socks", "being on the wrong tier", "no shave" or "contraband in his cell". Simons stated that at no time was he warned of the violations until the good time was taken away and the officer who accused him was not present at any of the proceedings.

Inmate David E. Nykeil stated that he appeared before a special disciplinary court in August of 1969 because he had refused to change cells; that he was not allowed to tell his side of the story; and was subsequently confined in a "dry cell" (without benefit of running water or a toilet) for 4 days.

Inmate Douglas Montgomery stated that he was before the Adjustment Committee on September 19, 1969, for defending himself in a fight, despite witnesses to the effect that he did not start the fight. The punishment that he received was loss of all good time, placement in a dry cell in solitary confinement, and, as a consequence, had to wait an additional six months for parole.

Inmate Rice stated that in June of 1971 he was sent to the Adjustment Committee for refusing an order to work, but that during the hearing he was not allowed to produce his own witnesses, nor was he allowed to confront his accuser. The punishment was loss of good time and 5 days in solitary confinement. On another occasion, Rice was written up for refusal to work when he was, in fact, in the hospital, and that when the true situation was learned the decision of the Adjustment Committee was to hold the report in abeyance. Rice believes this gives the Administration a future weapon and that the report should have been destroyed.

Rice said that he has been before the Adjustment Committee several times, but in no instance was the accusing officer present. According to Rice, although he has been before the Adjustment Committee nine times, he has never been made aware of the charge before arriving at the hearing. On September

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8, 1971, Rice was sent to the adjustment center for 43 days for failure to get a conforming haircut and suffered a loss of some good time as well. Of the 43 days, 12 were spent in a dry cell.

Inmate David Wade stated that he has appeared before the Adjustment Committee several times and that in none of the instances was the reporting officer present.

Inmate Gary Flynn stated that he had been before the Adjustment Committee four times for being drunk and that in none of the instances was the officer present who wrote him up.

Inmate Bobby Lee Maxwell stated that in his hearing before the Adjustment Committee he was not allowed to call any witnesses to support his side of the case and that none of the accusers was present. Maxwell added that he has lost all the good time he could possibly earn in the future, which includes statutory good time.

Inmate Terry Owen stated that in January of 1971 he had 5 days of good time taken as a result of a peaceful strike and the following day 90 additional days for the same offense. Later, Owen stated that he had 5 days of good time taken, his mailing and visiting privileges suspended and was placed in solitary confinement and on a restricted diet for "cussing an officer." In the latter hearing, the accusing officer was not present.

Inmate Donald Johnson stated that he was called before the Disciplinary Committee and charged with "sniffing". Johnson was not informed of the charge in advance and the accusing officer was not present. He lost all his good time and was sent to solitary for 9 days.

Inmate James Rollins stated that on April 28 or 29th, 1971, he had a hearing before the Adjustment Committee and lost 38 days extra earned good time and 16 months statutory good time without the accusing officer being present.

Inmate Anthony Jay Rogers stated that around January of 1970 the warden called all the inmates together and said that he was not absolutely sure he could still give extra good time for giving blood. Inmates continued to give blood in 1970 and all inmates who were paroled or discharged in 1970 were given credit for their "blood-time." But then, on January 1, 1971, the inmates still in prison lost all the blood-time which, for Rogers, amounted to 45 days.

Inmate Hart stated that he was placed in solitary for a month for organizing a protest against the warden.

Inmate Harold L. McGhee stated that he had on occasion lost good time without being notified as to amount, when taken, or for what reason.

Inmate Sammie L. Barbary stated that he had 90 days of good time taken for a sit down strike, during which the inmates were trying to get a better policy at the institution.

Inmate Dan Oldfield stated that in November of 1970 he lost 15 days of good time for "loitering." Oldfield was not notified of the charge prior to hearing and the accusing officer was not present.

It is evident that the procedure described by Warden Wolff in his testimony has not in practice been followed in all instances.

Courts have begun in recent years to recognize that fundamental due process is a right of all persons, including inmates, and have specifically held that before good time or other substantial rights may be taken there must be an impartial tribunal, notice, a hearing, a right to cross-examination of adverse witnesses, that the decision be based upon evidence adduced at the hearing, and that the inmate be allowed representation if he so desires. *See, e. g.*, Landman v. Royster, 333 F.Supp. 621 [E.D.Va.1971].

However, the Eighth Circuit has not yet followed the trend regarding application of procedural due process to good time revocation, but continues to view the problem in terms of the right/privilege dichotomy that was popular prior to Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 [1970] and its progeny. Douglas v. Sigler, 386 F.2d

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684 [8th Cir. 1967]. Such a position was recently affirmed in Morrissey v. Brewer, 443 F.2d 942 [8th Cir. 1971], which, although the question was then of parole revocation, must be applicable to good time as well. *See* Judge Urbom's memorandum and order of dismissal in McCoy v. Sigler, CV 71-L-119 [unreported memorandum D.Neb. May 13, 1971]. Thus, at this time, the Court will be compelled to hold that defendants must follow the Nebraska statutory procedure and no more. Were the Court free to decide, it would be inclined to follow the lead of the cases such as Landman v. Royster, *supra*.

The Nebraska statutory language of § 83-1,107 is to the effect that good time may be taken away "after the offender has been consulted regarding the charges of misconduct." Further, § 83-185(2) provides that "[e]xcept in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of assault, escape, attempt to escape or other flagrant or serious misconduct" . . . the good time provided for in § 83-1,107 may be withheld. Failure to meet the statutory requirements of consultation and flagrant or serious conduct would result in a violation of federal due process. Rueth v. Sigler, CV 71-L-251 [unreported memorandum, D.Neb. Nov. 19, 1971].

In the case at bar, the evidence is insufficient to show that any inmate was deprived of the statutory right to consultation. According to Warden Wolff's testimony consultation occurs at various levels in the adjustment process. The Court is not convinced that consultation by other than the Adjustment Committee itself satisfies the statutory requirement. However, the evidence that such consultations by the Committee do not regularly occur is isolated and confined to the statement of Inmate Emory. The Court is not convinced that the plaintiff has carried the burden of showing any deprivation of due process in this area of good time revocation.

[18-20] Reviewing the evidence previously summarized, it appears that good time has been revoked for such infractions as (a) messing up the "count up," (b) cussing a guard, (c) bringing a sandwich into the shop, (d) insurrection, (e) refusal to work, (f) threatening an officer's life, (g) "no socks", (h) being on the wrong tier, (i) no shave, (j) contraband in cell, (k) refusal to change cells when ordered, (l) fighting, (m) nonconforming haircut, (n) drunkenness, (o) sniffing, (p) organizing a protest, and (q) loitering. The question now for the Court is which of these infractions are within the statutory language of flagrant or serious misconduct, for which good time may be taken. Examples of flagrant or serious misconduct are given by the statute as "assault", "escape", and "attempt to escape". It seems apparent to the Court that fighting and threatening an officer's life would be within the statutory definition. It seems equally apparent that "messing up the "count up", cussing a guard, bringing a sandwich into the shop, "no socks", no shave, and failure to have a conforming haircut are not within the statutory definition and for which deprivation of privileges is the appropriate punishment. The defendants will be required to restore all good time taken for such offenses. On the other hand, such offenses as refusal to work, being on the wrong tier, contraband in cell, refusal to change cells when ordered, drunkenness, sniffing, organizing a protest and loitering are in the gray area of the statute and best left to the judgment of the Adjustment Committee, based on the facts of each case.

Inmate Rogers' statement regarding loss of blood time, in light of the provisions in the *Inmate Handbook*, *see* Appendix O (which was not shown in the evidence not to be still in full force and effect) amounts to a denial of due process. Defendants will be required to recredit all blood time earned by plaintiffs in 1970 and taken away on January 1, 1971.

An order in accordance with this Memorandum will be entered contemporaneously herewith.

APPENDIX A

CONTENTS OF INMATE LAW LIBRARY

Northwestern Reporter, 1st Series, Volumes 1-300.
Northwestern Reporter, 2nd Series, Volumes 1-112, Bound. Soft Back, 169-186.
Nebraska Reports, Bound Vols. 168 to 184.
Nebraska Supreme Court Journal, (subscription) 183 to 187.
Nebraska Digest, Vols. 1 to 12 and Index.
Attorney Generals Reports, Nebr. 1957 through 1964.
Laws of Nebraska, Bound vols, for 1957, 1959, 1961, 1963, 1965, 1967, 1969.
Laws of Nebraska, preliminary print, 1971.
Nebraska Statutes, 1964 Edition, Cum.Supp.1961, 1963, 1965, 1967.
Shepards Nebraska Citations, Cases analyzed, 1969 Bound Volume.
Shepards Nebraska Citations, Const.Laws.Stats.Rules, Analyzed, 1969 Bound Vol.
Subscription to Nebraska Citations
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Blacks Law Dictionary, 1968 Edition.
Rules of Civil Procedure, and title 28, 1968 Edition.
Rules of Criminal Procedure, and Title 18, 1968 Edition.
Prosser on Torts
Carrington, Civil Procedure—cases and comments.
Perkins, Criminal Law.
Perkins, Cases on criminal law and Procedure.
Sullivan, et al—Administration of Criminal Justice—cases and comments.
Sullivan, et al—Administration of Criminal Justice—cases and comments, 2nd edition.
Inbau—cases and comments—Criminal Justice.
Jones, et al—Cases and Materials on Contracts
Bade—Cases on real property.

Babb—Negotiable Instruments.
McKelvy on Evidence.
Rottschaifer—A Handbook of American Constitutional Law.
Holmes—The Common Law
Wiener—Briefing and Arguing Federal Appeals.
Trumbull—Materials on Lawyers Professional Responsibility.
Evidence, Nebraska Bar Association.
Dickerson—Fundamentals of Legal Drafting.

STATE OF NEBRASKA }
COUNTY OF LANCASTER } ss.

I, Jimmy D. Maddox, being first duly sworn, depose and state that the foregoing in (sic) a true and accurate list of the legal Books and materials presently in the Inmate law library and available to all inmates of the Pen Unit of the Nebraska Penal Complex.

/S/ Jimmy D. Maddox

Subscribed and Sworn to before me this 10 day of September, 1971.

Signature of Notary not visible.

APPENDIX B

RECEPTION AND DIAGNOSTIC CENTER

The first month of your stay will probably be more difficult for you than any other period. You must get used to the new surroundings, people, and restrictions that will be imposed upon you because of your loss of freedom to do as you wish. You will not be allowed to participate in some of the activities of the complex which will later be open to you.

This first month of your stay here is referred to as the Orientation Period, and there are reasons why you receive special treatment during this period of time.

First of all, it is necessary to avoid the possibility of communicable diseases which might be carried in with a new man. It is necessary that you be available for examinations, testing and interviews with staff personnel.

Also during this period of time, the rules and regulations to which you will be expected to conform will be explained to you. You will be advised as to why these regulations are in effect by the Director of the Reception and Diagnostic Center. It is not expected that you will agree with all of the rules. However, by trying to understand the reasons for them, you should be able to avoid any unnecessary situations which could prevent your making the best possible use of the time you have to do.

During this first month various department heads and supervisors will describe and explain the different programs and self-betterment activities in which you might participate. You will have to work. The complex would prefer that the work you do and the programs you participate in will help you become better equipped and determined to earn an honest living when you are released.

While all this is going on, a thorough investigation of your past history will be made so that an accurate case study can be compiled.

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Upon completion of your orientation period, you will appear before the Initial Classification Committee. Here, decisions will be made as to your initial custody, unit, living quarters, job assignment, school program, vocational training and other requirements necessary during your stay in the complex. These decisions are based on your past history, and the institutional record of your accomplishments or lack of them.

APPENDIX C

Legal Work

A legal advisor has been appointed by the Warden for the benefit of those offenders who are in need of legal assistance. This individual is an offender who has general knowledge of the law procedure. He is not an attorney and can not represent you as such.

No other offender than the legal advisor is permitted to assist you in the preparation of legal documents unless with the specific written permission of the Warden.

All requests to see the legal advisor or to do legal research in the legal library, must be submitted to the Captain's Office, who will then place you on a pass to see the advisor or to do legal work.

Legal material in the library cannot be taken to your living quarters.

Any time it is necessary to have legal papers notarized, send an interview request to the Captain's Office, stating your need.

APPENDIX D

The duties of the Inmate Legal Assistant are to assist any inmate unable to help himself in presentation of his claims of deprivation of his constitutional rights to the Court. Once the initial petition is prepared and submitted to the Court, and an attorney is appointed, the responsibility of the Inmate Legal Assistant is terminated.

Each New receptee is advised of his rights of appeal during his first week in the Reception Center. Should he wish to appeal his sentence or conviction, special forms for notice of appeal have been prepared for just this purpose. The inmate simply fills in the blanks with the necessary information, has them notarized and mailed to the Court.

Any Inmate that wishes to make use of the Inmate law library, for his own personal research, fills in the special request and submits it to the Captains Office indicating the date he wishes to have access to the Law Library. The available nights, are Monday through Friday.

Should any inmate of the Pen Unit wish to prepare his own personal petitions, and then have them typed by the Legal Assistant, he simply indicates the Number of copies he wishes and they are typed and returned to him. Should the Inmate wish to type his own petitions, a typewritter has been supplied for just this purpose. Any inmate may use the typewriter during Legal Research hours. If an Inmates Brief is to the Nebraska Supreme Court or the Eighth Circuit Court of Appeals, facilities have been arranged so that the legal Assistant or the Inmate only has to type the original Copy, the rest is photostated and duplicated in the Records office.

Inmates of the Reformatory Unit can consult with the Legal Assistant from 12:00 noon to 5:00 p. m. every thursday. At the Re-

formatory Unit, Reference books and other legal Material have been provided for the inmates. All duplicate books are transferred from the Pen Law Library to the Ref Unit. But should any book desired by an inmate not be in the Ref Unit library but in the Pen Unit Library, this Book is brought with the Legal Assistant on Thursday and checked out to the Inmate who must return the Book on the Following Thursday. Should the book not be found in either Library, it can be obtained from the Librarian at the University of Nebraska Law Library, arrangements have been in effect for the past Eight Months to loan any volume to the Legal Assistant for a period of 10 days.

During each Thursday visit to the Reformatory, every inmate who has requested an interview is called in to talk to the Legal Assistant, since its implimation (sic) over Eight Months ago an average of 9 Inmates are seen each Thursday, some weeks the total in (sic) only 5-6 other weeks as high as 15. During these interviews, the inmates problems are discussed and the best course of action is determined. If the inmate wishes to file under the post-conviction act, special writ forms have been prepared. (similar to the Federal Habeas Corpus form) should the inmate wish to institute divorce proceedings he is then referred to the Lincoln Legal Service Society.

Books and Material available at the Ref Unit are:

REVISED STATUTES OF NEBRASKA, COMPLETE, 1964 EDITION, CUM.SUP. 61 & 63
FEDERAL REPORTER 2d SERIES
FEDERAL SUPPLEMENT
SHEPARDS CITATIONS
OTHER REFERENCE BOOKS

/S/ Jimmy D. Maddox
JIMMY D. MADDOX
INMATE LEGAL ASSISTANT

APPENDIX E

M-71-403

To: All Inmate Bulletin Boards
From: Maurice H. Sigler, Warden
Date: June 8, 1971
Re: Inmate Law Library

Any person wishing to use the inmate law library for legal research must fill out the legal research pass request (blue form) that is maintained by the officer in each living quarters.

This request must be turned in to the cellhouse officer prior to 12:00 noon on the date you wish to have the pass issued. These requests will be forwarded to the Captain's Office and a decision made, because of limitation of numbers who will be allowed to be in the area at one time, as to who will be allowed to do legal research on a given date, and the pass will be issued.

This procedure is being written to try to avoid any delay of those wishing to exercise their legal rights by utilization of this legal library.

/S/ Maurice H. Sigler
Warden

APPENDIX F

M-71-402

To: All Concerned
From: Maurice H. Sigler, Warden
Date: May 25, 1971
Subject: Hours for Inmate Law Library and Legal Research

For the purpose of legal research, the following hours will be observed:

Monday evening, one hour from 6:00 to 7:00 p. m.
Tuesday evening, two hours from 5:00 to 7:00 p. m.
Wednesday evening, two hours from 5:00 to 7:00 p. m.
Thursday evening, two hours from 5:00 to 7:00 P. M.
Friday evening, one hour from 6:00 to 7:00 p. m.
Reformatory Unit, Thursday from 12:30 to 2:30 p. m.
5:00 p. m. (handwritten)

/S/ Maurice H. Sigler
Warden

Distribution:
Inmate Bulletin Boards
Warden
All Staff Members
Lieutenants
File

APPENDIX G

REFORMATORY UNIT

The Reformatory Unit is classified as a median institution and is designed in general for the benefit of the first offender of a non-violent offense. The specific function is to help you plan and carry out an institutional program which can equip you for useful citizenship upon release. Job assignments, educational facilities, vocational training, self-improvement groups, group therapy and recreational facilities are a few of the areas available in helping make this time serve you.

Should you have any problems or questions, contact the Associate Warden-Reformatory Unit, or your Counselor by means of an interview request.

APPENDIX H

M-71-406

DATE: June 30, 1971
TO: All Concerned
FROM: Maurice H. Sigler, Director
SUBJECT: Adjustment Center Legal Counsel

In order to insure the most effective method of facilitating individuals use of the legal assistant, it has been necessary to change the scheduling. In the future, the following procedure will be used for those inmates living in the Adjustment Center requiring legal assistance.

Effective immediately the inmate Legal Assistant James Maddox, #24017, will be escorted by a shift lieutenant, Thursday Mornings

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at 9:00 A.M. to the Adjustment Center for legal counseling and remain until 10:45 A.M. if necessary.

Maddox, will be stripped and searched when entering and before leaving the Adjustment Center, also any legal materials in his possession (sic) will be searched by the escorting lieutenant. The North Conference Room will be used for legal assistance. Adjustment Center Inmates who request legal assistance will be seen at this time. (Only one Adjustment Center Inmate will be permitted out of his cell and in this room at one time.)

There will be the escorting shift lieutenant and one extra officer in the Adjustment Center where the Inmate Legal Counselor is interviewing Adjustment Center Inmates.

/S/ Maurice H. Sigler
Maurice H. Sigler, Director
Division of Corrections

APPENDIX I

MAILING AND VISITING PRIVILEGES

Mailing and visiting will be an important part of your life while you are here, therefore, it is necessary that you know all the regulations. During the Orientation Period a mailing and visiting list will be made. Immediately after investigation and approval, you will be allowed to write to the following persons who are described as your immediate relatives: your parents or step/parents; wife; your children; grandparents; brother and sisters.

Mailing and visiting regulations permit you to have a total of ten (10) separate units on your list. You are allowed to have no more than three (3) friends, including one female friend.

Those persons classified as friends are: aunts, uncles, nieces, nephews, cousins, in-laws, and acquaintances. These persons must first be approved and will not be added to your mailing and visiting list until a complete investigation has been made.

Correspondence and visiting with one (1) female friend is permitted only when it is determined that both you and the female friend are single and free to marry. She must be eighteen (18) years of age or older and must have her parents or guardian's consent unless she is over twenty-one (21) years of age.

Three (3) free stamp credits are furnished to each offender per month, for three (3) free letters. This is paid by the complex. Any remaining letters must be paid for by you through the purchase of stamp credits from the inmate stores. The three stamp credits may be accumulated until the end of the respective year, at which time, if the stamp credits are not used they will be erased from your postage account. Postage stamps are contraband and are not allowed in your possession at any time.

Mailing and visiting regulations do not permit you to have the following on your list:

1. Co-defendants (persons involved in your crime.)
2. Children under the age of 18 other than your own children and your brothers and sisters.

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3. Minors over 18 years of age without the consent of their parents.

4. Married women, other than your wife, daughters, mother, sisters, and grandmothers. The husbands must be present when they visit.

5. Patients or offenders of other institutions, parolees, or probationers, unless they are members of your immediate family, and may be restricted to correspondence only.

6. Persons with a police record.

Once your mailing and visiting list has been compiled, no additions or deletions to your list may be made on other than the following dates:

Jan. 1–5 May 1–5 Sept. 1–5

Any time you have a change of address, send an interview request to the Mail Room, giving them the following information:

Old Address	Mr. & Mrs. John & Mary Doe 132 S. Main Street Anywhere, Nebraska 68502 (brother/sister-in-law)
New Address	Mr. & Mrs. John & Mary Doe 1001 Pie Square Somewhere, Nebraska 68501

Do not attach letter for mailing to the kite.
Deposit the letter in regular mail box.

You are permitted to write six (6) letters a week to those on your approved list. This number does not include business or legal letters. Notwithstanding restrictions on correspondence required by security and administrative reasons, business letters will be screened by the institutional counselors and legal documents (courts, judges) will be sent to Associate Warden-Reformatory or Associate Warden-Treatment for processing. The contents of the letter itself must be confined to strictly the special purpose for which the letter is intended. Letters directed to the Governor, Secretary of State, Attorney General, Director of Corrections, may be sealed and sent out. These letters are forwarded to the Associate Warden-Reformatory or Associate Warden-Treatment for mailing. All other letters must be left unsealed.

All incoming and outgoing mail will be read and inspected by the mail room officers and must be in English. The writing must be legible and large enough to be easily read. Letters must be written or printed on one sheet of stationery (J–304) using both sides of the sheet if necessary. Only one letter per envelope is allowed. Make certain you leave enough space at the bottom of each letter for your full name and number. It is necessary that your name and number be written on the inside of the flap of the envelope and that your committed name appears on the line provided on the face of the envelope. Mail not conforming to these practices will be rejected. The only exception to the single sheet of paper per letter is the sending of the *Forum*, school progress reports or the church bulletin without special permission. Letters received must be destroyed after thirty (30) days. The only

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exception are legal letters approved by Associate Warden-Treatment or Associate Warden-Reformatory.

Letters will not contain vulgar, obscene, offensive or threatening language in bad taste.

Letters must not contain reference to name of position of any officer or official of the complex.

Letters must not refer to events in or about the penal complex, such as escapes, disciplinary procedures, control measures, administrative procedure or about official affairs of the complex. Letters cannot contain reference to another offender or to criminal incidents.

When writing letters, you cannot ask for money and/or make any hint that you need money.

Should your people, however, desire to send you money, it must come in the form of money order or bank draft. Cash will not be accepted nor personal checks.

Every living quarters has a mail box which is provided for approved inmate mail. Should you have any question on this, ask your living quarters officer.

APPROVED YEARLY PACKAGES

PENITENTIARY UNIT

1. Tooth brushes
2. Shaving brushes
3. Safety razor & blades
4. Shoes, black or brown oxfords or loafers, with *rubbers heels* only.
5. Guitars, with permission of Assoc. Warden-Custody

REFORMATORY UNIT

1. Tooth brushes
2. Shaving brushes
3. Safety razor & blades
4. Shoes, black or brown oxfords or loafers with *rubber heels* only.
5. Guitars, with permission
6. Transistor radio, with permission
7. Watches, with permission

HOLIDAY PACKAGES

1. Limited to five (5) pounds
2. Received only during Dec. 15 through Jan. 1
3. Shelled nuts only
4. Fresh fruits, except grapes
5. Commercial candies, in original pkg. only
6. Only one (1) pkg. from approved correspondent.

Holiday package requirements are subject to change, and if so it will be corrected by holiday package change slips and bulletin board memo.

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The following are common articles which are not acceptable at any time:

1. Stamps
2. Home-cooked food & candy
3. Chewing gum
4. Lighter fluid
5. Cigarettes-tobacco
6. Sugar
7. Matches
8. Cash or personal checks
9. Liquids
10. Sealed containers
11. Any type tools
12. Clothing
13. Magazines
14. Newspapers

Greeting cards may be sent to anyone on your approved list and will not be counted against your weekly quota if it has only your signature. Greeting cards sent to persons not on your approved list must be channeled through your chaplain or parole counselor with only your signature and will not be counted against your quota.

Pictures may be sent to you from persons on your approved list. One (1) unframed picture no larger than 8 x 10 can be in your possession with a reasonable number of wallet size pictures. Pictures must be in good taste and cannot be obscene in any manner.

All subscriptions for magazine or newspapers will be handled by the Hobby Association officer.

Newspaper clippings cannot be received or sent out in any letter without approval.

VISITING

It is important that you become thoroughly familiar with the regulations governing visits. You should explain these fully to members of your family and friends, so that they will not be inconvenienced and make useless trips to the institution and then learn they will not be able to visit you.

Visiting hours for inmates living inside the walls at the Penitentiary Unit are Monday through Friday from 12:00 noon to 3:45 p. m., excluding holidays and Board of Parole day—usually the third Thursday of each month.

No visiting privileges will be allowed men during the Orientation Period.

Visiting hours at the Trusty Dorm, Penitentiary Unit, are on Saturdays only from 12:00 noon to 3:45 p. m.

It is your responsibility to notify your authorized visitors as to where and when you can visit, as you are allowed two (2) visits a month. The number of visitors present at any time is subject to limitation. Normally three (3) adults can visit at one time.

Visiting hours at the Reformatory Unit are Saturdays, Sundays from 8:00 a. m. until 3:30 p. m. One special Holiday visit, that being Christmas. Visits are allowed on either a Saturday or Sunday of a given weekend, but not both.

Smoking is permitted in the visiting room, therefore, you may bring a sealed package of cigarettes or cigars. The only other articles you can carry with you on visits are your lighter, a comb and handkerchief. The wearing of a wrist watch, a ring, or a religious chain is permissible.

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Visitors may purchase two (2) packages of cigarettes for you from the vending machine. (An offender is not permitted to handle any money at any time.) The cigarettes must then be given to the officer in charge of the visiting room, who will put your name and number on them and send them to your living quarters. You cannot carry cigarettes that have been bought for you back to your living quarters.

Except for candy bars eaten in the visiting room and cigarettes smoked in the visiting room, you may not accept anything from a visitor and you may not give anything to another person (visitor) at any time.

Moving from one visitor to another is not permitted.

A strip shakedown will be given before and after visiting.

Rule of Reason must govern you while visiting. Any behavior in poor taste may result in the restriction of the privilege of visiting.

Special visits from Attorneys, Ministers and Law Enforcement Officers must be arranged in advance with the Associate Warden-Treatment, Associate Warden-Reformatory, or Associate Warden-Custody.

APPENDIX J

M-71-401

MEMORANDUM

Date: April 1, 1971
From: Maurice H. Sigler, Warden
To: All Inmate and Employees
Subject: No Limit Mailing

Effective this date, certain major changes will be made to the existing mailing procedure for inmates confined within the Nebraska Penal and Correctional Complex.

The primary change is effective this date, which will permit inmates to write any number of letters to persons on their authorized correspondence list and will be known as "No Limit Mailing".

In addition to this, in the future, all inmates will be permitted to use two (2) pages of inmate stationery in each letter mailed if desired.

If an individual is involved in misconduct and is brought before the Adjustment Committee and disciplinary action is found to be necessary, the No Limit Mailing privilege will be revoked automatically on the date of the Adjustment Committee action. When No Limit Mailing is revoked, a man will be limited to mail six (6) letters per week for one (1) calendar year. The same action would apply if a man has a poor work report submitted on him in any given month.

At the end of a full year without misconduct, an individual may request to be reinstated on No Limit Mailing through the Sub-Classification Committee.

In the future, new men placed in the population of either institution will automatically be placed on the No Limit Mailing as long as each individual maintains a clean institutional record.

/S/ Maurice H. Sigler
Maurice H. Sigler, Warden

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APPENDIX K

M-71-399

MEMORANDUM

Date: April 1, 1971
From: Maurice H. Sigler, Warden
To: All Inmates and Employees
Subject: Bonus Visiting

Effective this date, a new and innovative approach has been made in the existing visiting procedure for the Penitentiary Unit of the Nebraska Penal and Correctional Complex. The term will be known as "Bonus Visiting".

The Bonus Visiting will involve all men who are presently confined in the Penitentiary Unit, regardless of past institution adjustment or disciplinary offenses. Each will be approved to have three (3) visits each month, and will continue to be given on an individual basis each month as long as the individual maintains a clean institutional record.

If an individual is involved in misconduct and is brought before the Adjustment Committee and disciplinary action is found to be necessary, the Bonus Visiting will be revoked automatically on the date of the Adjustment Committee Action. When Bonus Visiting is revoked, a man will be limited to two (2) visits per month for one (1) calendar year. The same action would apply if a man has a poor work report submitted on him in any given month.

At the end of a full year without misconduct, an individual may request to be reinstated on Bonus Visiting through the Sub-Classification Committee.

In the future, new men placed in the population of the Penitentiary Unit will automatically be placed on the Bonus Visiting and will receive three (3) visits per month as long as each man maintains a clean institutional record.

/S/ Maurice H. Sigler
Maurice H. Sigler, Warden

APPENDIX L

83-185. Chief executive officer; responsibilities; duties. (1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of assault, escape, attempt to escape or other flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83-1,107 be forfeited or withheld and also that the person be confined in a disciplinary cell. The chief executive officer may order that such person, during all or part of the period in a disciplinary cell, be put on an adequate and healthful diet. A person in a disciplinary cell shall be visited at least once every eight hours. No cruel, inhuman or corporal punishment shall be used on any person.

(3) The chief executive officer shall maintain a record of breaches of discipline, of the disposition of each case, and of the punishment, if any, for each such breach. Each breach of discipline shall be entered in the person's file, together with the disposition or punishment therefor.

(4) The chief executive officer may recommend to the Director of Corrections that a person who is considered to be incorrigible by reason of frequent intentional breaches of discipline, or who is detrimental to the discipline or the morale of the facility, be transferred to another facility for stricter safekeeping and closer confinement, subject to the provisions of section 83-176.

APPENDIX M

83-1,107. Chief executive officer; reduction of sentence; provisions. (1) The chief executive officer of a facility shall reduce for good behavior and faithful performance of duties while confined in a facility the term of a committed offender sentenced as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:

(a) From his minimum term, to determine the date of his eligibility for release on parole; and

(b) From his maximum term, to determine the date when his release under supervision becomes mandatory under the provisions of section 83-1,111.

(2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term shall be forfeited or withheld after an offender is released on parole.

APPENDIX N

83-1,109. Chief executive officer; reduction of sentence; report; Director of Corrections; duties. The chief executive officer of a facility shall regularly report all reductions of prison terms for good behavior and faithful performance of duties and for especially meritorious behavior or exceptional performance of duties, and all forfeitures and restorations of such reductions to the Director of Corrections. On the basis of such report, the director shall inform the Board of Parole and the Parole Administrator of all committed offenders who are expected to become eligible for release on parole or whose release on parole will become mandatory within the next three months.

APPENDIX O

RECORDS OFFICE

The Records Office is important to you inasmuch as here is where your official time is calculated and recorded. As well, any reference

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to detainers and your personal property file are maintained in this department. Any questions should be directed to the Records Officer.

The following is the amount of statutory time you receive on a sentence:

For the 1st yr. you are allowed 2 months statutory time;
for the 2nd yr., you are allowed 2 months statutory time;
for the 3rd yr., you are allowed 3 months statutory time;
for the 4th yr. and every year thereafter, you are allowed 4 months statutory time per year.

Extra-Earned Good Time

You will receive five (5) days a month for receiving average or above average work reports. A poor work report will result in your not receiving this work good time.

Blood Time

Anyone who donates blood to the American Red Cross receives good time credits for their donations. Anyone under the age of 18 must have the Warden's approval. Those over 18 may voluntarily give blood on the following scheduled months: MAY, AUGUST and DECEMBER. The Red Cross Bloodmobile unit is generally scheduled for the first full week of the months mentioned above.

You will reduce from your sentence, via the Board of Parole approval, five days for the first donation, ten days for the second donation, and fifteen day for every donation thereafter.

Should you receive a disciplinary report or below average work report any time between donations, you will be credited only five days the next time you donate blood to the Red Cross as a result of the disciplinary action.

APPENDIX P

THE CUSTODIAL DEPARTMENT

The Captain, Lieutenants, Sergeants and Correctional Officers are under the direct supervision of the Associate Warden—Custody, and help maintain discipline within the penal complex. They are charged with your supervision in all matters such as count, conduct, job assignment and recreation. You must follow their instructions.

The Correctional Officers and all other personnel within the penal complex are employed and trained to carry out the policies approved by the Administrative Staff. They will help you in any reasonable way if you show that you are interested in being helped. They are, however, empowered and required to take any and all actions they deem necessary to do their duties as required by existing laws, whether or not such action may be an infringement upon any implied privilege or directly contrary to any of the rules and regulations—wanton cruelty is an exception.

LIVING QUARTERS & PERSONAL HYGIENE

Your living quarters are your home. Because of the large number of men who will be in this housing area, sanitation and cleanliness and good conduct are of utmost importance. It is your responsibility,

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therefore, to assist by using good common sense and respect for the other man.

For your benefit, the following rules and regulations are listed to help you make this stay in the complex serve you.

There are several official counts each day. When count is being conducted in your living quarters, you are required to stand at the door of your cell and be counted during daytime counts. Do not speak to the officer while he is making the count. When there are counts at night after you retire, some portion of your body must be visible to the officer making the count (skin must be showing).

Your bed will be made neatly and your living area clean before going to work each day. Basin, toilet bowl, floor and bars will be cleaned daily and scuff marks removed from the walls. The contents of your living area must be arranged as instructed. Living quarters must be ready for inspection at all times.

Always remember that YOU are responsible for the articles found in your area.

The only items or furniture permitted in your living quarters are those furnished by the complex, items (within prescribed limits) purchased through the stores and approved items sent in from outside sources.

All empty medicine bottles and containers are contraband and must be turned over to the officer in charge of your living quarters.

Because of sanitation, fire or other objectionable hazards, you are not allowed to keep magazines, paper back books, newspapers and other collectable items such as clippings, in your quarters after the expiration date of the items.

Personal letters must be destroyed after 30 days as shown by the inspector's stamp.

You may not scratch, mark, or otherwise deface the walls or fixtures of your living quarters. Do not tamper with windows, door locks, electric light fixtures, radio headphones, nor hang pictures or other articles on the walls, nor in any manner impair a neat, orderly appearance of your quarters.

Other than on flag galleries (bottom floors of cell houses) curtains are not permitted. They must be regulation size and issue.

Smoking in bed is against the law.

You are not permitted to lay in your bed with your shoes on.

Entering any living quarters other than those to which you are assigned, without specific permission by officials, is forbidden.

You are expressly forbidden to sleep, lounge or loiter upon another offender's bed at any time. Nor can you loiter around or in another offender's living quarters.

When you are living in a cell house, you must go directly to your cell. You may talk with your living quarter mate until it is time for lights out. At this time you are to undress immediately and retire.

Unnecessary disturbances, rowdiness, and boisterous conduct of any nature is strictly forbidden.

Personal Cleanliness

You are required to shower twice a week, but encouraged to shower daily, at the prescribed time. Five (5) minutes is allowed to shower.

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It is a must that you present a clean and neat appearance at all times, work permitting, with pockets buttoned, shirt buttoned except for the collar button, shoes clean and hair neatly trimmed and combed. Regulation haircuts will be no longer than one-quarter inch for the first inch above the ears. Hair on top of the head will not exceed three (3) inches in length.

You are required to have a haircut every two weeks. No sideburns, mustaches, or beards are permitted at any time. Hair will be neatly tapered-cut in the back, and not squared or duck-tailed at any time.

You must be clean shaven at all times.

You are issued the following toilet articles: 1 shaving soap; 1 hand soap; 1 shaving brush; 3 razor blades. When you use what you have, you may draw more by asking the officer in charge of your living area, or at regular issue.

Upon your assignment to a living area you are issued all the clothing and equipment required for your use. You are responsible for all items issued to you. Do not alter, damage or dispose of your clothing or equipment in any manner or for any reason. When it becomes unserviceable, turn it in to the officer for exchange.

All wearing apparel, including civilian shoes, must be marked with your number.

The clothing and linen issued to you is listed below in the maximum amount you should have on your person or in your living quarters. Having more than the listed amount will result in disciplinary action.

a. Two (2) blue shirts
b. Two (2) blue pants
c. Two (2) pair of shorts
d. Two (2) blankets
e. Two (2) sheets
f. Two (2) towels
g. One (1) white shirt; for group activities—visit (unless assigned to job where white clothes are mandatory)
h. One (1) blue jacket (not to be sent in with laundry)
i. One (1) handkerchief
j. One (1) pair of socks
k. One (1) T-shirt
l. One (1) pillow case
m. Two (2) long underwear (in season)
n. One (1) cap (according to season)

Anytime a coat is worn, at least two of the buttons must be buttoned (from the bottom of coat) except while you are participating in recreational activities. All but the top button of your shirt must be buttoned at all times. Shirt sleeves may be neatly rolled (but not above the elbow.)

The items listed below are laundered daily and must be exchanged daily at shower time or on an emergency basis:

1. T-shirts
2. Handkerchiefs
3. Socks
4. Towels

Shirts, pants, shorts, are laundered TWICE A WEEK. Bedding is laundered once a week. All RDC laundry is laundered once a week.

All offenders with job assignments in the hospital, dental department, all kitchens, dining rooms, barber shops, butcher shop, front entrance store, milk processing, will be issued seven (7) sets of white clothing to wear on the job. White hats are issued on the job.

Gloves are issued for various assigned jobs and must remain in that area at each concluding work day.

Gloves for personal wear can be purchased from the store.

Straw hats are issued to those individuals assigned to utility details and farm work where there is a need in the summer only.

Hooded sweat shirts are issued and can only be in the possession of those men working outside in the cold continuously.

Athletic & Recreation sweat shirts and jerseys are for sports activities only.

Any unauthorized item found in your living quarters will be considered contraband.

CONTRABAND

Contraband is any item that is not purchased by you at the store, issued to you by the state, or stamped and approved by complex officials. Items received by trade or barter are contraband. Possession of contraband will result in disciplinary action. Regular search of your person and quarters is established routine.

GENERAL RULES

Any inmate who escapes or attempts to escape, or takes part either actively or passively in a mutiny, riot, or insurrection, will be severely punished and is subject to trial in State courts.

The making of false, malicious, or vicious statements about any official, or supervisor of any inmate is strictly forbidden.

Paying a bribe for any service rendered by other inmates is forbidden.

The preparation or use of any beverage other than those normally served during meals or specially approved at other times, is prohibited.

The preparation or use of any item or substance for smoking or chewing, other than approved foodstuffs, confections, and tobacco items, is strictly forbidden.

Reference to another inmate, either in writing or orally, by any other than his correct name, or commonly used name in good taste, is forbidden. This means derogatory names such as "Burglar", "Paper Hanger", etc., will not be used by anyone when referring to another individual or to themselves.

You shall address all officers and staff members by their title; for example: Officer, Mr., Dr., Lieutenant, or Sir. Never address an officer or official by his first or last name only.

Colored glasses unless prescribed by the doctor, will be worn only out of doors.

Mutilation of your physical body in any manner is prohibited. This includes tattooing, self-inflicted injuries, or self-performed surgical procedures of any and all types.

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Possession of any negotiable item, such as stamps or monies in any form, is prohibited.

In the event of any emergency such as an accident, fire, or failure of facilities, you must conduct yourself according to currently established procedure, and not impede, crowd, nor hamper corrective action. This means you must not leave your assigned post other than to give normal required assistance or to report a situation, unless ordered to do so by proper authority, or to evacuate according to established procedure.

You must not at any time deliberately attempt to conceal yourself or your actions, or any other offender or his actions, from observation of the officer in charge, or from an established observation post.

APPENDIX Q

Nebraska Penal and Correctional Complex

Penitentiary Unit

General
Policy and Procedure

Inmate Control
Misconduct
and
The Adjustment Committee

April 1, 1971

Policy: **In the interest of treatment-oriented discipline, it is necessary that inmates and staff members maintain high standards of behavior, courtesy and personal conduct. It is the policy of this institution, in administering discipline, to gain voluntary acceptance of certain limitations by the inmate body. Discipline must be realistically administered in order to maintain the general welfare of the institution community and conformance to specified standards and regulations, while at the same time implementing treatment of the offender.**

Purpose: **To set forth the institutional policy and procedures for the administration of discipline to insure that disciplinary processes are carried out as an integral part of the total treatment program, and to establish professional standards for all employees in fulfilling this responsibility.**

Standards of Conduct. **The institution population will be kept informed through the orientation process and by written orders and memorandums as to the standards of conduct expected. When it becomes necessary to regulate and control a man's conformance to the prescribed standards, disciplinary measures consistent with treatment of the individual will be applied in appropriate degree and in an impersonal, impartial manner.**

Misconduct.

a. Major Misconduct: Major misconduct is a serious violation and will be reported formally to the Adjustment Committee on the Misconduct Report Form and/or detailed narrative.

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b. Minor Misconduct: Minor misconduct is a less serious violation which may be resolved immediately and informally by the inmate's supervisor or formally reported on the Misconduct Report Form. Repeated minor misconduct should be formally reported.

Misconduct Reports:

a. Preparation: In reporting misconduct on the Misconduct Report Form, the report should be prepared carefully and accurately so as to describe events exactly as they happen. The accurate preparation of a Misconduct Report is a major contributing factor in accurate evaluation of the misconduct by the Adjustment Committee. The initial statement on the report should be a brief statement of the charge or charges, followed by a detailed report of the incident. Articles of evidence should always accompany the report.

b. Processing of Misconduct Reports: Completed Misconduct Reports along with any articles of evidence, should be forwarded to the Chief Correction Supervisor's office for investigation. The Shift Lieutenant will conduct an investigation, note his findings, and submit to the Chief Corrections Supervisor. The Chief Corrections Supervisor will review the report, conduct additional investigation if necessary, interview the Shift Lieutenant and officer submitting report, and verify the accuracy, proper preparation of the report and assemble all information and articles regarding the misconduct report. Upon completion of this investigation, all information will be noted on the space provided on the Misconduct Report, then submitted to the Chairman of the Adjustment Committee so the case may be promptly scheduled for a committee hearing.

Administration of Discipline: The administration of discipline is hereby delegated as follows:

a. All employees will resolve immediately and informally minor violations by any inmate under their observation and/or supervision.

b. The Chief Corrections Supervisor will initiate prompt investigation on all misconduct reports and will maintain control of any adverse situation and its inmate participants.

c. Adjustment Committee will receive reports of misconduct, conduct hearings, and make findings and impose disciplinary actions.

The Adjustment Committee:

a. Organization: The Adjustment Committee is composed as follows: Associate Warden Custody, Chairman; Correctional Industries Superintendent, Member; Reception Center Director, Member.

Note: The Adjustment Committee is responsible for the preparation of meeting agenda, recording, distribution, and filing of all reports as necessary for institution requirements. Further, the committee will answer directly to the Administrative Assistant on matters of discipline, adjustment, and investigations conducted relative to the daily processing of Misconduct Reports.

b. Committee Functions:

(1) The Adjustment Committee will meet daily at 8:00 a. m. in the office of the Associate Warden Custody and/or the Adjustment Center, as required.

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(2) The Committee will review and evaluate all misconduct reports as to the underlying causes for the adverse behavior and will carefully consider all possible courses of action before reaching a decision. Disciplinary action in all cases will be treatment oriented.

(3) The Committee is authorized to conduct investigations, make findings, impose disciplinary actions, refer cases for further diagnosis, recommend program changes and take any other actions deemed necessary to insure decision effectiveness.

(4) The Committee will concern itself with institution policies and procedures which effect discipline, strive to maintain consistence in its actions, and continually evaluate the effectiveness of its decisions by appropriate follow-up.

(5) The Committee will maintain accurate records and assure the prompt and proper completion of all required reports and forms.

(6) The Committee will review each week or more often, the progress of all inmates housed in the Adjustment Center and initiate or recommend program changes when indicated. The Committee will document all actions, reviews, and program changes so as to provide the Classification Committee with a clear, concise picture of individual inmate adjustment.

Adjustment Committee Actions:

a. General Principles:

(1) The decisions and recommendations of the Committee will be the result of group consensus and judgment.

(2) Full consideration must be given to the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals.

(3) Disciplinary measures will be taken only at such times and to such degrees as are necessary to regulate and control a man's behavior within acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge.

(4) Action will be taken as soon after the occurrence as circumstances permit.

(5) Work assignments and program changes will not be used as disciplinary measures.

(6) The use of corporal punishment is strictly prohibited.

(7) Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center, withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein.

Use of Segregation: Inmates may be placed in segregation for any one of the following reasons, and documentation on either the Misconduct Report Form or in narrative must be sent to the Associate Warden Custody in each case.

a. To insure immediate control and supervision.
b. To protect potential victims.
c. To insure witnesses against intimidation.
d. As a punishment for some major institutional infraction.
e. To control those whose violent emotions are out of control.

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f. To insure their safety or the safety of others.
g. To insure the safety and security of the institution.
h. Demonstrated defiance of personnel acting in the line of duty.
i. Willful refusal to obey orders.

Note: Inmates awaiting action of the Adjustment Committee will not routinely be placed in the Adjustment Center unless one or more of the above reasons are evident.

No man should remain in the Adjustment Center longer than necessary, and special care must be taken to insure that this unit does not become a haven for those who persistently fail to solve their problems.

The Adjustment Committee will conduct a review each week or more often, of all cases in the Adjustment Center in discipline, to consider possible treatment alternatives.

In addition to this, the institution counselor will maintain a progress file on long-term confinement cases. The Counselor has the responsibility to maintain contact with those inmates who are housed in segregation and report their progress or lack of progress to the Adjustment Committee. These progress reports are prepared at the end of each month and are used as a tool in determining further action by the Adjustment Committee.

Maurice H. Sigler, Warden.

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1331

Robert O. McDonnell, etc.,
Appellant,

v.

Charles L. Wolff, Jr., etc., et al.,
Appellees.

No. 72-1332

Robert O. McDonnell, etc.,
Appellee,

v.

Charles L. Wolff, Jr., etc., et al.,
Appellants.

Appeals from the United States District Court for the District of Nebraska.

Filed: September 12, 1973.

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

PER CURIAM.

The petition for rehearing or rehearing en banc is denied.

APPENDIX-3

Our opinion of August 2, 1973, does not require the state to provide or permit legal counsel to every state prisoner involved in a prison disciplinary hearing which may result in a serious penalty. Rather, we follow *John R. Gagnon, Warden* v. *Gerald H. Scarpelli*, No. 71-1225 (41 LW 4647, May 14, 1973), in holding that counsel is required only in those cases where fundamental fairness cannot be achieved absent counsel.

Prison authorities are to be given an opportunity, on remand, to state whether they will provide or permit counsel in those cases which must be reheard for lack of procedural or substantive due process pursuant to this opinion. They will also be afforded an opportunity to give reasons for their decision in each case. Thereafter, the District Court may, on request, reexamine the state's decision in the light of *Scarpelli*.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., ET AL., PETITIONERS

v.

ROBERT O. MCDONNELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in support of the petition for a writ of certiorari filed by the Warden and Associate Warden of the Nebraska Penal and Correctional Complex. Petitioners seek review of a decision of the court of appeals setting forth standards applicable to inmate discipline and custody. The United States, through its penal agencies, is directly concerned with the consequences of this decision insofar as it may affect procedures regarding the management and con-

trol of federal prisoners in facilities in the Eighth Circuit and elsewhere.

ISSUES PRESENTED

1. Whether the same due process requirements applicable to parole and probation revocation proceedings announced by this Court in *Morrissey* v. *Brewer* and *Gagnon* v. *Scarpelli* are applicable to prison disciplinary proceedings.

2. Whether such newly-announced standards should be given retroactive application so as to invalidate prior prison disciplinary proceedings.

3. Whether the court below properly held that prison officials are barred from opening incoming mail from attorneys to inspect for contraband.[1]

STATEMENT

On July 1, 1970, respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, brought a civil rights action under 42 U.S.C. 1983 in the United States District Court for the District of Nebraska. He alleged that disciplinary proceedings in the Complex were conducted in violation of procedural and substantive due process; that the inmate legal assistance program did not meet constitutional standards; and that the regulations governing prisoners' mail were unconstitutionally restrictive.

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[1] We take no position with regard to the other questions raised in the petition.

An evidentiary hearing was conducted by the district court[2] at which respondent and other inmates testified with regard to matters alleged in the pleadings. The court also received testimony from a number of prison officials. On April 21, 1972, the district court granted partial relief, finding, *inter alia*, (1) that the prison policy of reading all incoming and outgoing mail was improper, and (2) that prison authorities were not required to provide inmates with procedural due process at disciplinary hearings (Pet. App. 15-47; 342 F. Supp. 616 (D. Neb.)).

The court of appeals reversed in part and remanded holding that the procedural due process requirements articulated by this Court in the context of parole and probation revocation proceedings (*Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778) "should be generally followed" with respect to prison disciplinary hearings (Pet. App. 4). It therefore directed the district court to determine what requirements were necessary to meet these standards, including the circumstances in which assistance of counsel may be required. The court of appeals further concluded that in those instances where past disciplinary hearings had not been held

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[2] Prior to the hearing, District Judge Urbom issued a temporary injunction enjoining petitioners from opening mail from respondent's attorney or from respondent to his attorney. Following a hearing limited to that injunction, at which petitioners presented testimony of then Warden Sigler and other state officials detailing the practical considerations underlying the need for perusal of all mail, Judge Urbom withdrew the temporary injunction (Pet. App. 21-22; 342 F. Supp. at 622-623).

in compliance with these new requirements, determinations of misconduct must be expunged from the record (Pet. App. 7). Finally, the court of appeals affirmed that portion of the district court's holding striking down the prison regulation which called for the opening and reading of mail to and from attorneys (Pet. App. 11-13).

ARGUMENT

In deciding that all of the procedural due process requirements applicable to parole and probation revocation proceedings, as outlined in *Morrissey* v. *Brewer* and *Gagnon* v. *Scarpelli*, are applicable to prison disciplinary hearings, the court below has rendered a decision not only substantially extending the teachings of *Morrissey* and *Scarpelli*, but also basically at odds with the underlying rationale of those decisions. Indeed, its views in this respect are contrary to those of every other court of appeals that has passed on this issue. See *Braxton* v. *Carlson*, 483 F. 2d 933 (C.A. 3); *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (C.A. 7); *Adams* v. *Carlson*, No. 73-1268 (C.A. 7), decided August 23, 1973;[3]

[3] In *United States ex rel. Miller* v. *Twomey*, *supra*, the Seventh Circuit expressed "disagreement with the proposition that whatever procedural safeguards are required for a parole (or probation) revocation hearing are also necessarily applicable to an in-prison disciplinary hearing." 479 F. 2d at 716, n. 31. Accordingly, the court held that there is no absolute right to confront or cross-examine witnesses and said it was doubtful that counsel or a lay substitute is essential. *Id.* at 715. The court held, however, that due process required at

Sostre v. *McGinnis*, 442 F. 2d 178 (C.A. 2) (*en banc*), certiorari denied *sub nom. Oswald* v. *Sostre*, 405 U.S. 978. Thus, the instant decision, in misconstruing *Morrissey* and *Scarpelli*, creates a clear conflict among the circuits on an issue which is of pressing importance to state and federal correctional officials.

Of equal importance is the holding below that *Morrissey* should be given retroactive application in the prison disciplinary setting (Pet. App. 7). Not only is this ruling contrary to the rule of *Morrissey* itself, it also adds to a serious conflict among the courts of appeals in the context of both parole revocation and prison disciplinary hearings. Compare *Valdez* v. *Perini*, 474 F. 2d 19, 20-21 (C.A. 6); *Zizzo* v. *United States*, 470 F. 2d 105, 108 (C.A. 7), certiorari denied, 409 U.S. 1012; *M'Clary* v. *California Adult Auth'y*, 466 F. 2d 1122, 1124 (C.A. 9), with *Adams* v. *Carlson*, *supra*.

In short, for several important reasons discussed more fully below, plenary review by this Court is called for.

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least that a prisoner receive advance written notice of the charges against him and be afforded a fair opportunity to explain his version of the events (possibly including a right to insist that witnesses be called or interviewed) and that the factual determination must not be made by the officer who reported the infraction. *Id.* at 715-716. In *Adams* v. *Carlson*, *supra*, the Seventh Circuit held that the standards of *Miller* applied to prior disciplinary actions in a federal prison and remanded the case to the district court to determine whether the *Miller* standards were satisfied and whether they should be enlarged. The United States is presently considering whether to petition for certiorari in *Adams* v. *Carlson*.

1. A major consideration prompting this Court in *Morrissey* to adopt minimal due process requirements in parole revocation hearings was the fact that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievious loss' on the parolee and often on others." 408 U.S. at 482. It is this element of personal liberty—qualified though it may be—that materially differentiates a probationer or parolee from a prisoner. "Though the State properly subjects [the parolee] * * * to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." *Ibid.* It is thus a "serious deprivation" (*Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 781) to have one's parole or probation revoked. Moreover, the seriousness of such a decision is compounded by the question whether revocation is not "unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Id.* at 785. It was in such a context that this Court decided that certain minimal due process requirements had to be met before revocation was justified. The Court indicated that it would be an entirely different matter to extend these requirements to the prison setting—where authorities have the problem of "controlling a large group of potentially disruptive prisoners in actual custody." *Morrissey*, *supra*, 408 U.S. at 483.[4]

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[4] The court of appeals gave no consideration to the threshold question in the *Morrissey-Scarpelli* analysis, *i.e.*, whether the action in question involves a deprivation of "liberty" within

Prison discipline involves dealing with the misconduct of a substantial population of men or women of diverse criminal background, who are placed in confinement under the supervision of comparatively few custodians. This environment presents frequent physical dangers and psychological pressures. See *Edwards* v. *Sard*, 250 F. Supp. 977, 981 (D. D.C.). With this in mind, the Third Circuit has noted (*Braxton* v. *Carlson*, *supra*, 483 F. 2d at 941):

> The focus of the Adjustment Committee function is rehabilitative rather than punitive. We believe, therefore, that the transformation of this informal hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses, and written record could be self-defeating. We are apprehensive of the volatile effect such adversarial proceedings could have on internal prison control and stability. We fear that prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point by formal adversarial proceedings often involving varying shades of minor infractions.

This is not to suggest that no regularized procedures should be adopted to meet the disciplinary

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the contemplation of the due process clause of the Fifth or Fourteenth Amendment, and it would appear to be an open question whether such liberty as a prisoner may have is also within the contemplation of the due process clauses of the Constitution. But see *United States ex rel. Miller* v. *Twomey*, *supra*, 479 F. 2d at 712-715, 716-718. However, petitioners do not contend that prison disciplinary sanctions involve deprivation of a prisoner's liberty within the meaning of the Constitution.

problems of the prison situation. It is simply to say that those procedures must be keyed to the problems and needs for which they are created. Such an objective is not served by the automatic transplantation to the prison scene of the *Morrissey-Scarpelli* standards, which are meant to serve entirely different problems and needs. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands," and "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey, supra*, 408 U.S. at 481. In the prison setting, consideration of what process is due requires an evaluation of the nature of the government function and the interest served by less formalized disciplinary procedures, as against the inmates' interest in more structured requirements. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895.

The Third Circuit, in *Braxton* v. *Carlson, supra*, has recently had occasion to explore the question of what process is due prison inmates in institutional disciplinary actions. While that case involved a federal correctional institution, it presented due process issues comparable to those involved in the instant case. In *Braxton*, the court specifically rejected adoption of the wide-ranging procedural standards mandated by this Court in other contexts, in favor of formulation of due process safeguards specifically appropriate for the prison disciplinary setting. It found erroneous the assumption that the prison disciplinary proceeding is adversarial in the same sense as is a criminal trial, pointing out that "[d]ue process in a

correctional institution setting should not be 'so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.'" 483 F. 2d at 940 (quoting *Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 778). The court went on to conclude (483 F. 2d at 940):

> In light of the combined goals of fact determination and correctional treatment and rehabilitation intrinsic in the Adjustment Committee's tasks, we agree with the Second Circuit that due process is present when facts are rationally determined in a proceeding where the prisoner (1) is notified of the accusation and informed of the evidence against him, and (2) is afforded a reasonable opportunity to explain his actions [citing *Sostre* v. *McGinnis*, *supra*].

Such procedures are followed in federal prison institutions as a matter of course. In the Federal Prison System, the Adjustment Committee or Treatment Team has the basic responsibility for administration of inmate discipline. The Committee consists of at least three members, *i.e.*, the Associate Warden (or, in the case of a minimum security institution, the Camp Superintendent) as chairman, a case worker, and a correctional officer. The Committee has access to a broad range of dispositional alternatives: it may exonerate the inmate and order the charge removed from his record; it may release him from segregation with time served; it may continue him in segregation with further review at a later time; it may order him returned to the general population subject to certain restrictions, withdrawal

of certain privileges, or removal from certain programs or job assignments or quarters; it may recommend the inmate be transferred to another institution; and it may refer the matter to the Good Time Forfeiture Board.

An inmate charged with misconduct is advised of the specific charges by a staff member other than the reporting officer and is given an opportunity to state his version of the incident. Within 24 hours after the placement in segregation, investigation of the report of misconduct is completed by the staff member, and written notification of charges is given the inmate. If the charges are serious, the matter is referred to the Adjustment Committee, which meets at least three times a week. When the inmate is called before the Committee, he is again advised of the charges and asked for a statement with reference thereto. If the inmate denies the charges or the Committee has some doubt about them, the matter may be referred back for further investigation. Witnesses are generally not called, nor is the reporting officer available for cross-examination. The Committee's determination is based on a review of the misconduct report, the results of the investigation, and any supporting information or statements. The Adjustment Committee report must clearly state the offense, place and time of occurrence, and witnesses; it must also include a clear statement of the conclusions of the Committee as to the inmate's involvement in the prohibited act, the information upon which the conclusion is based, and the Committee's

disposition. Finally, the inmate must be advised in writing of the Committee's decision. See Bureau of Prisons Policy Statement 7400.5B, "Inmate Discipline," issued June 6, 1972.[5]

The Adjustment Committee cannot withdraw an inmate's accrued good-time credits. The Adjustment Committee refers violations to the Good-time Forfeiture Board for consideration of forfeiture of earned or accrued good time. The Board consists of three members. At the Board's hearing, the inmate is given a copy of the charges and is advised of the procedures. If the inmate states that the charges are correct, he is given an opportunity to offer a statement in mitigation. If he denies the charge, he is advised that he may have a member of the staff represent him before the Board, and he is given an opportunity to meet with this representative. After the report of misconduct and the evidence supporting it are received, the inmate is permitted to make a statement and request witnesses on his behalf. If a witness is unavailable, his written statement may be submitted. After considering the report of misconduct and compiling a summary of findings, the committee may recommend to the Warden forfeiture of good time. The Warden reviews the report and orders such forfeitures as he deems proper. The inmate may appeal the Warden's decision to the Office of General Counsel, Bureau of Prisons. See Bureau

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[5] Copies of the Bureau of Prisons policy statements regarding inmate management are being lodged with the Clerk of this Court and served on counsel for the parties.

of Prisons Policy Statement 7400.6A, "Withholding, Forfeiture, and Restoration of Good Time," issued August 13, 1971.

We submit that such procedures, which take account both of the institutional setting and the needs of the prisoner, are sufficient to provide the "procedural protections * * * the particular situation demands." *Morrissey, supra*, 408 U.S. at 481. To the extent that the decision below held that additional procedures are required by due process, it should be reversed.

2. In remanding this case to the district court with directions to determine the minimum due process standards necessary under *Morrissey* and *Scarpelli*,* the court of appeals indicated that these standards should be given retroactive application. Thus, the

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* We concur with Nebraska's contention that the court of appeals erred in directing that the district court adopt the appropriate due process standards without first permitting prison officials an opportunity to formulate suitable guidelines. In our view, the proper initiators of change in existing procedures are the professional prison administrators and not the courts. We do not mean to suggest that federal courts must abstain altogether from eliminating arbitrary procedures; rather, we suggest that prison officials should be given the initial opportunity to adopt sufficient safeguards. As the Third Circuit properly observed with regard to the role of the courts in formulating affirmative guidelines for prison administrators: "Our expertise is limited; our knowledge of the extensive day to day prison problems is minimal; our ability to foresee the effect of procedural changes on treatment, rehabilitation and programmatic process is imperfect." *Braxton* v. *Carlson, supra*, 483 F. 2d at 942. See also *Morrissey* v. *Brewer, supra*, 408 U.S. at 488-489; *Sostre* v. *McGinnis, supra*, 442 F. 2d at 205.

court observed that in cases where prior disciplinary hearings failed to comport with the new standards, the misconduct reports should be expunged from prison records (Pet. App. 7).

There is no support for this novel doctrine of retroactivity. In *Morrissey, supra*, 408 U.S. at 490, this Court made clear that its due process requirements were "applicable to *future* revocations of parole * * *" (emphasis added). Even if the substantive principles of *Morrissey* were applicable to prison disciplinary actions, there is no basis for a rule of retrospective application. *Morrissey* recognized the severe disruption to state and federal correctional systems that would follow in the wake of guidelines not previously mandated or employed. The same considerations apply with even more compelling force in the area of prison disciplinary proceedings. During fiscal 1973, the United States Board of Parole conducted 1173 revocation hearings; during the same period, however, the Federal Bureau of Prisons held approximately 19,000 misconduct hearings.[7] The impact of retroactive application of standards relating to misconduct hearings would therefore be enormous. Particularly in light of the lesser impact of prison disciplinary actions on the individual's liberty, there is thus no reason to depart here from the *Morrissey* rule of prospectivity.

3. We agree with the petitioners that the decision below takes an unrealistic approach to attorney-in-

[7] There were approximately 18,000 Adjustment Committee hearings and 100 Good-Time Forfeiture Board hearings.

mate correspondence, although we do not address ourselves to the Nebraska prison rules under review insofar as they differ from the current rules of the Federal Bureau of Prisons.

Pursuant to policies presently in effect, the Federal Bureau of Prisons does not open or inspect correspondence from inmates addressed to an attorney.[*] With respect to incoming mail, correspondence addressed to an inmate by an attorney may be opened, but solely for purposes of inspection for physical contraband. This mail is not read or copied. In addition, inmates are advised that, at their option and with the concurrence of their attorney, mail from the attorney will be opened only in their presence. See Bureau of Prisons Policy Statement 2001.2B, "Access to Legal Reference Materials and Legal Counsel and Preparation of Legal Documents," issued May 8, 1972.

Under the Nebraska rules involved in this case, all mail between prisoners and their attorneys was opened, inspected and read. 342 F. Supp. 635-636. The courts below held that this practice was unjustified and invalid (Pet. App. 11-13).

It is axiomatic that prison authorities may not, through correspondence regulations, hamper an in-

---

[*] Attached to the inmate's letter is a statement from the chief executive officer of the institution advising counsel (1) that the facility retains the right to open mail from attorneys to inspect for physical enclosures constituting contraband, (2) that such mail will not be read or copied, and (3) that inspection will be conducted in the presence of the inmate, if the attorney so indicates on the envelope.

mate's access to the courts (*Ex parte Hull*, 312 U.S. 546), and correspondence with counsel is an essential element of that access. Limited inspection of incoming mail from counsel, however, as conducted under current federal regulations, does not unduly infringe on these principles, and does not, as a practical matter, impair an inmate's access to the court or to his attorney. We submit that the extent of inspection provided for by the federal prison rules strikes a permissible balance between the inmate's right to correspond with counsel and the practical needs of prison authorities to maintain some control and surveillance over materials entering the prison.[9]

Accordingly, at least to the extent that the court of appeals' decision would bar even the limited inspection practices of the Federal Bureau of Prisons, it is unsound and warrants review by this Court.[10]

---

[9] Although the court below characterized the introduction of contraband by attorneys as a remote possibility, we note that the firearm used during the escape attempt by convict George Jackson, which led to the slaying of the three California prison guards, was apparently brought into the prison by his attorney. See *New York Times*, Aug. 23, 1971, p. 1. We understand that the attorney has since been indicted for this action, although he has not yet been apprehended.

[10] This Court's decision in *Procunier* v. *Martinez*, No. 72-1465, argued December 3, 1973, may have some bearing on this issue.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

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JANUARY 1974.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

vs.

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

vs.

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 483 F. 2d 1059.

The opinion of the United States District Court for the District of Nebraska is reported in 342 F. Supp. 616.

The jurisdiction of this court is invoked under the authority granted it to review by writ of certiorari to any civil case in the courts of appeals under 28 U. S. C. § 1254 (1). The judgments sought to be reviewed were entered

by the United States Court of Appeals for the Eighth Circuit on August 2, 1973, petition for rehearing and suggestion for rehearing en banc was denied by said court on September 12, 1973, and the petition for certiorari was filed in this court on October 23, 1973, within 90 days of the entry of the judgment sought to be reviewed as provided by 28 U. S. C. 2101 (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in

any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(2) Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(3) 42 U. S. C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(4) 42 U. S. C. § 1985:

"(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

"(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so

attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may

have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(5) Ninth Amendment, United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(6) Tenth Amendment, United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 29-2204, Reissue Revised Statutes of Nebraska 1943, Volume 2A, page 467:

"29-2204. Sentence; term of imprisonment; hard labor; solitary confinement. In all cases when any person shall be convicted of any offense by this code declared criminal, and made punishable by imprisonment in the Nebraska Penal and Correctional Complex, the court shall declare in its sentence for what period of time, within the respective periods prescribed by law, such convict shall be imprisoned at hard labor in the Nebraska Penal and Correctional Complex; and shall moreover determine and declare in its sentence whether any such convict shall be kept in solitary confinement in the cells of the Nebraska Penal and Correctional Complex, without labor, and if so, for what period of time."

QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances, if any, does procedural due process require the state to furnish counsel or

permit retained counsel for inmates in prison disciplinary proceedings?

2. Should the state penal authorities or the federal district court lay down minimum procedural due process requirements for disciplinary hearings in penal institutions in the first instance?

3. Are state prison authorities barred from opening incoming mail from attorneys, if such mail is opened in the presence of the inmate addressee for the sole purpose of inspecting for contraband not otherwise discoverable?

4. Must state penal authorities furnish legal assistance, or a reasonable alternative, to inmates to prepare civil rights actions as well as habeas corpus suits?

5. May the federal courts order newly devised prison procedural requirements to be applied retroactively to prior prison disciplinary proceedings?

———o———

STATEMENT OF THE CASE

Robert O. McDonnell brought this civil rights action on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex alleging that disciplinary proceedings in the Complex were conducted without regard to procedural or substantive due process, that the inmate legal assistance program did not meet constitutional standards and that the regulations regarding inspection of incoming mail from attorneys to inmates were violative of the inmates' constitutional rights.

Prison disciplinary proceedings in the Nebraska Penal and Correctional Complex are conducted without lawyers on either side. The Penal and Correctional Complex had adopted rules and regulations for the conduct of disciplinary proceedings which are set forth in Appendix 2 of the Petition for Writ of Certiorari, p. App-45 (Appendix Q of Federal District Court Opinion in 342 F. Supp. 616 at 645).

A lay inmate legal assistant has been appointed by the Warden for the benefit of those offenders in need of legal assistance in the courts. No other inmate other than the legal advisor is permitted to assist other inmates in the preparation of legal documents unless with the specific written permission of the Warden. Appendix 2 of the Petition for Writ of Certiorari, p. App-30. (Appendix C and D of 342 F. Supp. 616 at 631.)

The law library itself is open on Monday, Tuesday, Wednesday, Thursday and Friday evenings for independent research by an inmate unassisted by the legal assistant. The law library is open from five p. m. to seven p. m. on Tuesdays and Thursdays and from six p. m. to seven p. m. on Monday, Wednesday and Friday. For security reasons, the number of inmates that may be allowed in the library at any one time is six. Some inmates have a conflict with school attendance on these evenings.

The district court found that it had examined over fifty petitions in the last twelve months originating in the Penal Complex which were sufficiently drafted to apprise the court of the claim and that in addition the court appoints counsel for 95 percent of all the habeas corpus petitions and most of the civil rights cases where complex,

factual allegations are involved including the appointment of counsel in the present case. Appendix 2 of the Petition for Writ of Certiorari, p. App-20, (342 F. Supp. 616 at 621.)

The Court of Appeals in the present case in the judgment now questioned ordered that the Federal district court and not the state authorities should lay down the specific requirements, including the circumstances in which counsel may be required, in prison disciplinary hearings. Appendix 1 to Petition for Writ of Certiorari, p. App-4; (483 F. 2d 1059, 1063).

The court further held that as to the general inmate legal advisor program the defendants must take into account the need of inmates for assistance in civil rights actions as well as habeas corpus suits. The court further held that there be expunged from prison records, determinations of misconduct arrived at in hearings that failed to comport with the new minimum requirements to be established by the district court. That in cases where the district court determined counsel should have been furnished that the order would be retroactive and the state would be afforded an opportunity to provide counsel on cases which must be reheard for lack of procedural or substantive due process pursuant to that opinion and the state's decision not to provide counsel could be reexamined by the district court in light of *Scarpelli*. See Appendix 3 relating to rehearing.

The court also held that mail from an attorney to an inmate could not be inspected for contraband absent some exceptional circumstance and that a simple telephone call

could be used to ascertain if the letter was actually from an attorney.

The basis for the federal jurisdiction in the first instance was the Civil Rights Act, 42 U. S. C. § 1983 and § 1985.

SUMMARY OF ARGUMENT

1. The Court of Appeals has not only applied the procedural guidelines of *Morrissey v. Brewer* and *Gagnon v. Scarpelli* carte blanche to disciplinary proceedings, it has even gone further and directed the Federal district court to make specific requirements when legal counsel may be required in such proceedings. *Morrissey v. Brewer* refused to require counsel as to parole revocations and *Gagnon v. Scarpelli* refused to set any hard and fast rules in probation revocation.

In tracing the history of corrections, imprisonment is of relatively recent origin. In both the Quaker concept and the Puritan system, solitary confinement was not uncommon.

(a) Before it can be determined whether or not there are circumstances in which counsel is required at disciplinary proceedings, it must first be determined whether any due process is due. In other words, when a person is given due process during the investigatory stage, the trial, the sentencing, and possibly another due process revocation of probation hearing, it is finally determined that the felon should be sent to a prison, from a consti-

tutional sense has he not received all the due process that is due for the various types of treatment and restrictions he may receive in prison so long as the same is not cruel and unusual? While present policy dictates fair and rehabilative measures, is not the only constitutional restriction so far as treatment and discipline are concerned the restriction against cruel and unusual punishment?

After this court in *Morrissey v. Brewer* reversed the Eighth Circuit, petitioners (defendants) dropped their contention that minimum procedural due process was not applicable as to revocation of good time which, in Nebraska is directly related to parole. However, since *Preiser v. Rodriguez*, the issue of good time revocation is no longer involved in this case.

The rudimentary due process requirement of *Goldberg v. Kelly* is not the minimum requirement of all human relationships. It must be determined first that there is a deprivation of liberty before the exact nature of the due process safeguards must be ascertained.

(1) This court has already noted the difference between the liberty of a prison inmate and that of one on parole or probation and that summary treatment may be necessary to controlling prisoners in actual physical custody.

(b) Assuming that there is some due process due in such proceedings, a number of prison administrators and other interested groups have formulated proposed guidelines and procedures for the conduct of such hearings. Most, if not all of said recommendations recognize the impossibiilty of providing counsel at said proceedings.

Furthermore, a requirement that counsel be provided in certain types of disciplinary hearings would certainly open the door to untold numbers of civil rights actions in the other cases where counsel was not provided.

2. Both *Morrissey v. Brewer* and *Gagnon v. Scarpelli* left the initial drafting of the rules of procedure to the body charged with conducting the hearing; the direction of the court below that the Federal district court make this determination should be reversed.

3. A prison rule that suspect mail, even from attorneys, may be opened, but not read, to inspect for contraband in the presence of the inmate addressee would not be an unreasonable invasion of the right to access to the courts. The directions of the Court of Appeals in the present case are confusing and burdensome of enforcement.

4. The requirements of *Johnson v. Avery*, that prison authorities may not prevent one inmate from assisting another in the preparation of actions for post conviction relief unless a reasonable alternative is furnished should not be extended to the preparation of civil rights cases. Such an extension would put an unreasonable burden upon the Federal courts as well as the prison administration in the absence of any constitutional right requiring it.

5. The new guidelines for parole revocations in *Morrissey v. Brewer* were applied to future cases only and there is no reason to apply prison discipline requirements based thereon, retroactively.

———o———

ARGUMENT

1. Requiring Counsel at Prison Disciplinary Hearings

Introduction

On page 4 of the current opinion, the Honorable Judge Heaney, after stating that the procedural requirements of *Morrissey v. Brewer,* 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (revocation of parole), and *Gagnon v. Scarpelli,* (May 14, 1973), 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756, (probation revocation), should be generally followed in prison disciplinary proceedings, goes on to direct the district court to make specific requirements when *legal counsel* may be *required* in such proceedings. This is a great extension of both *Morrissey v. Brewer* and *Gagnon v. Scarpelli* and any previous holdings of the United States Supreme Court.

In *Morrissey v. Brewer,* of course, the United States Supreme Court stated as to parole revocations:

> "* * * Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole. * * *."

The Court then specifically stated:

> "We do not reach or decide the question whether the parolee is entitled to the *assistance of retained counsel or to appointed counsel* if he is indigent." *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484 at 499. (Emphasis added.)

The United States Supreme Court decided in *Gagnon v. Scarpelli, supra,* that as to probation revocations, the question of right to counsel should be decided upon a case-by-case basis and specifically distinguished such a hearing from a criminal trial, stating:

> "In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented not by a prosecutor but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives not from the invariable attributes of those hearings but rather from the peculiarities of particular cases." *Gagnon v. Scarpelli,* 411 U. S. 778, 36 L. Ed. 2d 656 at 665.

The above distinctions are even more true as to disciplinary proceedings in prison. There is no lawyer or prosecutor present for the state and the formal procedures and rules of evidence are certainly not employed.

Judge Heaney cites *Remmers v. Brewer, et al.*, No. 72-1490, (C. A. 8th, Mar. 12, 1973), and *Dodson v. Haugh, et al.*, No. 72-1314, (C. A. 8th, Feb. 14, 1973), for the proposition that the Eighth Circuit has held that minimum procedural due process requirements are applicable to prison disciplinary hearings.

While this is certainly true, neither case extends the requirement to include a right to counsel.

In view of the state of the law as to right to counsel at parole revocation hearings and probation revocation hearings, where the actual freedom of an individual is at stake as compared to the lesser rights involved in prison disciplinary hearings where the conditions of custody of one who has already lost his freedom are involved, and where the hearings are entirely conducted by lay individuals unschooled in the law, not to mention the financial, planning and scheduling impact a requirement of legal counsel for inmates would have in state and federal prisons nationally (and the concomitant problems of furnishing attorneys for prison officials,) we respectfully request this court settle the law on this question as well as the others set forth below. Even if a requirement of counsel would only result in limited use of lawyers, the fact of such a requirement would lead to untold thousands of new civil rights actions in hearings where counsel was denied. And as illustrated later, there are not enough lawyers in the United States to do the job anyway.

This court is of course well aware of the terriffic congestion in the Federal Courts throughout the Nation, a great percentage of which involves civil rights actions by prison inmates. It would serve no useful purpose at

this point for the petitioners to attempt to set forth all of the varied rulings by the Federal District Courts and the Courts of Appeals concerning notice, hearing, cross-examination and all of the other many issues being litigated in regard to prison disciplinary hearings; it is interesting to note, however, that until a few years ago the Federal Courts would rarely interfere with state prison administration except in cases involving cruel and unusual punishment. Now, with the hundreds of Federal Court decisions concerning state prison administration, state prison administrators must wonder if incarceration is any longer a legal form of punishment for those convicted of crimes.

Sometimes it is well for us to go back to the early beginnings to see where we have arrived today. A succinct history of corrections is contained in House Report No. 93-329, 93rd Congress, 1st Session, June 26, 1973, which states in part as follows:

> "I. CORRECTIONS—BRIEF HISTORY
>
> "In tracing the history of corrections we need to recall that until the age of enlightenment the criminal law was a barbaric, brutal institution. Governments were arbitrary, capricious, and inhumane in administering criminal penalties: Offenders were commonly disemboweled. At one time in England capital punishment was administered for stealing as little as a few shillings' worth of property. During the 18th century enlightened minds began to revolt over the penal system's brutalities.
>
> "As a penalty for those who violate the law, imprisonment is of relatively recent origin. Imprisonment did not become society's principal method of punishment until the latter part of the 18th century. One

root of the American correctional system can be traced to early English and European workhouses and houses of correction dating from the middle of the 16th century. These institutions were built in response to increasing numbers of beggars, vagrants, and petty thieves who plagued the urban communities of the late Middle Ages. In time the high hopes for these institutions evaporated as they increasingly functioned as catchalls for a variety of petty offenders, troublesome individuals, and mental defectives.

"Great social philosophers—Montesquieu and Voltaire—pleaded for the recognition of certain human rights for those charged with crime. An Italian nobleman named Beccaria, the first reformer to formulate the concept of the modern system of justice, pleaded for punishments appropriate to particular crimes, for fair trials, and for the end of confessions induced by torture. In England, John Howard analyzed and criticized the prison systems of the day; and in America, John Adams and Thomas Jefferson took up the fight for penal reform.

"The American penal system had two principal models. The Pilgrims, who left England because of social injustices, brought with them criminal codes almost as severe as those which they left behind. An exception to these harsh Colonial laws was the 'Great Law' of William Penn, embodying the comparatively humane Quaker criminal code. The Quakers provided the keystone around which penal reform developed in America. This New World reform was accompanied by parallel developments in England and on the Continent. Following the revolutions which brought democracy to France and America, the Quakers developed strong allies in their drive for humane treatment of offenders and in the substitution of imprisonment for corporal and capital punishment.

"In 1794, Pennsylvania adopted a new code which reduced the list of capital crimes to first-degree murder and prescribed imprisonment for other offenses. This was the beginning of what is known as the 'penitentiary,' a word taken from the Quaker concept of giving a man a Bible and putting him in a cell to repent.

"Whether the productive labor of the prisoner was to be given priority over his moral regeneration became the basis of a long conflict between the Quaker model penitentiary constructed at Cherry Hill, Pa., in 1829, and the Puritan prison built at Auburn, N. Y., in 1823. The objective of the Quaker penitentiary system was to save the sinner through reflection and penitence. The objective of the Puritan system, on the other hand, was to produce obedient citizens. Prisoners at Auburn were confined to solitary cells at night, and during the day worked together under a rule of silence. Since the 'congregate' or Auburn system, was copied in one form or another in many States, the Puritan model became the prevalent prison system in the United States and, until the Civil War, the so-called industrialized prisons, which were fashioned after the Auburn model and which utilized prison labor for profits to prison officials and the States, increased in number. Following the Civil War, however, the radical changes which shook the Nation's economy had an adverse effect on prison industries, and prison overcrowding began to alter the Auburn single-cell theory.

"At the turn of the 20th century, reforms instituted included construction of heating and toilet facilities, providing health and medical services, and providing for athletic activities. Although many prisons remained industrialized, pressure against prison-made goods was mounting and by the 1930's, Federal legislation virtually ended the sale of prison goods. World War II saw the introduction of the concept of 'classification' which was used initially in relation to security. Classification is the correctional process of divid-

ing offenders, based on known characteristics, for security and treatment purposes. The 1940's also saw the prisons opening their gates to a limited number of teachers, social workers, and psychologists.

"In the 1950's and 1960's, a little advancement in penal reform was made, although a small number of progressive institutions made headway in developing concepts aimed at rehabilitating the prisoner rather than maintaining a system directed toward the 18th and 19th centuries' focus on retribution, penitence, and punishment."

(A REPORT BY THE SELECT COMMITTEE ON CRIME, House Report No. 93-329, Union Calendar No. 157, 93rd Congress, 1st Session, June 26, 1973.)

(a) How far does the due process given a defendant during investigation, trial, conviction and sentence extend into the prison environment or is any due process due?

Before the question of right to counsel, if at all, in disciplinary proceedings can be answered, the more fundamental question must be probed as to whether due process is due a prison inmate not only in disciplinary proceedings but in the other various proceedings which go on within a penitentiary. The Constitution of the United States as well as the Constitution of the State of Nebraska specifically recognizes that the State has the power to imprison or even take a life so long as "due process" and "on the indictment of the Grand Jury" are followed; Amendments Five and Fourteen, United States Constitution, Article I, Section 3, Nebraska Constitution ("no person shall be deprived of life, liberty or property without due process of law").

For the purposes of argument, we must assume that the courts in sentencing the inmates here in question did so under due process of law and under valid statutes authorizing a period of time in a state or federal penitentiary. The basic fundamental question which must next be answered is what is the totality of the circumstances, the way of life, the conditions, and the environment contemplated by the Constitution, the statutes, and the sentencing court when committing an inmate by due process of law to "imprisonment" in a state or federal prison? Is not all the Constitution, by its terms, thus preserved to such persons is that such punishment not be cruel and unusual? We are all familiar with certain judicial statements in recent years that a prison inmate does not lose all of his constitutional rights (in addition to cruel and unusual punishment) by going to prison. But such statements as to this problem are made without citation of authority and have been arrived at by the bootstrap method. We are not advocating that the "slave of the state" concept of prison inmates should be retained or returned to, but we are seriously concerned with how much of the question or questions here involved are bound up with policy decisions and how much with constitutional rights. Does not the commitment to a penitentiary, so far as the Constitution of the United States is concerned, in fact, contemplate that the person is being punished for a crime and that he is in fact losing the rights of a free citizen and his liberty? Does the Constitution actually reserve any rights of a free citizen, applicable here, to such persons other than such punishment shall not be cruel and unusual? In other words, when the prison inmate received his due process during the investigatory stage of the al-

leged crime, the trial and the sentencing, and the court, after all this, determined that he should go to the penitentiary, hasn't he received his procedural due process to be in the kind of a place he is in and subjected to the kinds of things to which he is subjected so long as they do not amount to cruel and unusual punishment which is, by the Constitution, prohibited without any further procedural due process?

Petitioners are certainly not advocating that inmates should be disciplined for charges of serious misconduct without adequate notice and fact finding hearings, or, for that matter, that work release programs or the many other humanitarian reforms which have been instituted in the Nebraska Penal and Correctional Complex be removed or infringed but, on the contrary, that the goals of corrections should be the rehabilitation of the inmate, reduction of recidivism and protection of society. However, petitioners suggest that these are matters of policy and not required by the Constitution; we contend, in the words of the majority in *Morrissey v. Brewer, supra,* at 408 U. S. 481, that "the nature of the interest" of the inmate is not one "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." Since deprivations of good time were ruled out of this civil rights case by the court below, (App 1, Petition for Writ of Certiorari, p. App-6, 483 F. 2d 1059, 1064.) the most severe punishment in the penitentiary under consideration is that of confinement in the Adjustment Center or what is commonly referred to as "solitary confinement." Section 29-2204, R. R. S. Nebraska 1943, which has not been amended since 1929, set forth above requires the court in sentencing to state the amount of time the convict

is to be kept in solitary confinement. The commitments under this statute could sentence an inmate in the first instance to solitary confinement for a certain period or could provide that solitary confinement should be no part of the sentence except for violation of prison rules. Thus, the sentencing court in Nebraska after the due process trial, may either determine what portion of the sentence must be spent in solitary confinement at the beginning or require solitary confinement for violations of prison rules.

A point relating to petitioners' position should be clarified.

The United States Court of Appeals for the Eighth Circuit in the present case, referring to the fact that it had been reversed in *Morrissey v. Brewer*, 408 U. S. 471, subsequent to the trial in the present case stated:

> "In view of the developments in the law, subsequent to trial, the defendants *no longer contend* that inmates are not entitled to minimum due process in disciplinary hearings which may result in the loss of good time, or the imposition of other substantial penalties. Instead, they argue that existing procedures provide such due process. * * *." (Emphasis supplied.) (App 1, Petition for Writ of Certiorari, p. App-3, 483 F. 2d 1059, 1062.)

The statement of the court is accurate as to the defendant's position on revocation of good time, as clearly limited in our brief in that court, because in Nebraska good time is directly related to parole-involved in *Morrissey;* this is no longer in the case because of the holding in *Preiser v. Rodriguez*, 411 U. S. 475, 36 L. Ed. 2d 439, 93 S. Ct. 1827 requiring a habeas corpus proceeding. Obvi-

ously, any other concession of the attorney for petitioners as to other types of punishment would be completely irrelevant now since the U. S. Supreme Court had not yet determined that any procedural due process was due and we now question whether such is the case. Furthermore, obviously petitioners (defendant's below) do not have the power or authority to confer, take away, or determine constitutional rights.

The fact that many prison administrators, wardens, interested associations and others are drafting some form of rules for disciplinary procedures and all of the activity in this regard in the recent years is undoubtedly the result of their feeling that they are required to do so by the activist approach of the Federal District Courts and the United States Court of Appeals throughout the nation and particularly the specific requirements and supervision by the federal district judges over prison rules and regulations such as in *Morris v. Travisono,* 310 F. Supp. 857 (D. R. I. 1970), discussed infra, and *Wright v. Jackson,* — F. Supp. —, CV186-73-AM (U. S. D. C. Vir. Nov. 1973). One writer has analyzed a number of the well known lower Federal Court cases relating to prison discipline most of which in one way or another rely upon *Goldberg v. Kelly,* 397 U. S. 254; he points out that there is a different issue in the case involving prison disciplinary proceedings than in *Goldberg,* because in prison disciplinary proceedings there are times when the prison setting permits the use of summary proceedings in the disposition and at other times the rudimentary due process requirements are less than in the factual situation of *Goldberg,* stating:

"* * *. In *Clutchette, Krause,* and the first *Sostre* case, the courts assumed that the words 'rudimentary due process' referred to a conceptual due process guarantee that would be present whenever someone was subject to 'grievous loss.' If such loss was present, the *Goldberg* due process safeguards would automatically attach. There are two major reasons why this analysis is unwarranted: (1) the *Goldberg* court limited its decision to the exact factual situation before it; and (2) due process does not always require *Goldberg*-type protections.

"In *Goldberg,* the Supreme Court ruled that certain 'minimum procedural safeguards' were necessary due to the 'particular characteristics of welfare recipients' and 'the limited nature of the controversy to be resolved.' The Court also stated that it was dealing with 'rudimentary due process' in a 'developing area of law.' The Court was referring to the relatively new area of state and federal welfare law. It is unrealistic to argue that the words 'rudimentary due process' refer to anything other than 'rudimentary due process' under the particular facts of *Goldberg.* The words do not apply to every situation in which a person may be 'condemned to suffer grievous loss.'

"Due process does not always require *Goldberg*-type protections. The *Goldberg* Court stated that:

> "'[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as the private interest that has been affected by governmental action.'

"If the concept were adopted that the Fourteenth Amendment required *Goldberg*-type standards as 'rudimentary due process' in every case, due process would no longer be a flexible tool. The only reason a court would have for using a balancing of interests test would be to determine if more than *Goldberg*-

type safeguards were needed in a certain case. Under this theory, no circumstances could arise in which due process would demand *less* than a *Goldberg*-type hearing." (NORTH DAKOTA LAW REVIEW, Vol. 49, No. 3, Spring 1973, p. 690.)

He then concludes:

"* * *. If such deprivation does exist, (of life, liberty or property) the court must next determine the exact nature of the due process safeguards which will satisfy the Fourteenth Amendment. The court's decision, in this second step, is formulated by balancing the nature of the inmate's interest against the nature of the burden that a strict trial-type hearing will work upon the prison administration." (NORTH DAKOTA LAW REVIEW, Vol. 49, No. 3, Spring 1973, p. 696). (Parenthetical phrase supplied.)

Of course this court in *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 and again in *Gagnon v. Scarpelli*, (May 14, 1973), 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 did refer to *Goldberg v. Kelly, supra*, insofar as the determination of whether rudimentary due process should be invoked in parole revocations and probation revocations and set forth the standards for such rudimentary due process; therefore, all of the speculative Federal Court cases as to whether and as to what rudimentary due process is due in disciplinary cases based on *Goldberg v. Kelly* would now seem to be irrelevant to the present discussion.

As stated by Mr. Chief Justice Burger in *Morrissey:*

"* * *. To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some

process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." (*Morrissey v. Brewer*, 408 U. S. 471, 481.)

(1) This Court has already noted the difference between liberty on parole and prison confinement.

The majority in *Morrissey* through Mr. Chief Justice Burger recognized the difference in the "liberty" of a parolee from a prison inmate, noting:

> "* * *. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. * * *." (*Morrissey v. Brewer, supra*, 408 U. S. 471 at 482.)

Later on the distinction is again made between a parolee's liberty from prisoners in custody:

> "* * *. Although the parolee is often formally described as being 'in custody,' the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody. * * *." (*Morrissey v. Brewer*, 408 U. S. 471 at 483.)

Thus, in the determination in *Morrissey v. Brewer* whether life, liberty or property had been deprived thereby invoking due process, the court, definitely made a distinction between persons on parole and those in prison. If the prison inmate is to be deprived of "liberty" by the disciplinary proceeding it is certainly of a much less degree. It should also be emphasized at this point that this

court further recognized that in prison, *summary* treatment may well be necessary.

Inasmuch as losses of "good time" which go toward eligibility for parole are not cognizable in this review, the proposition that the prison inmate may be deprived of "liberty" at the disciplinary hearing is therefore quite questionable.

(b) Due process in prison disciplinary proceedings generally.

Assuming some process is due, look at what some of the people in the field have been saying and proposing may be enlightening.

The National Council on Crime and Delinquency has drafted a model act to provide for minimum standards for the protection of rights of prisoners, copyright 1972. The portion on disciplinary procedure is found in section 4 and provides in part as follows:

> "§ 4. Disciplinary Procedure.
>
> "* * *. Any punishment that may affect the sentence or parole eligibility (such as the loss of good-time allowance) shall not be imposed without a hearing at which the prisoner shall have a right to be present and a right to be represented by counsel or some other person of his choice. * * *." ("An Act to Provide for Minimum Standards for the Protection of Rights of Prisoners," WASHINGTON UNIVERSITY LAW QUARTERLY, Summer 1973, p. 643 at 645.)

The above provision, while it has a provision for representation by counsel, is the only provision providing for

a hearing and apparently is limited to loss of good time—at least that would be its effect in Nebraska. There is no hearing provided for in any other type of punishment. In the same law review article the model act is discussed by various persons, one of whom James W. L. Park, Facilities and Program Planner, California Department of Corrections; formerly Associate Warden-Administration, California State Prison at San Quenton, states concerning section 4:

> "* * *. The 'right to be represented by counsel or some other person of his choice,' however, is a dangerously broad provision that could lead to a number of unfortunate circumstances. While representation by legal counsel may be welcome news to hundreds of unemployed young lawyers, it can result in an administrative nightmare in which all but the most gross forms of destructive behavior will be ignored by prison employees because of the endless litigation a charge of rule violation would entail.
>
> "California's relatively mild provision for an employee to serve as an 'Investigating Officer' has turned what used to be a five-minute process on minor infractions into hour-long hearings, occurring after days of delay. Under an attorney-adversary system, most men would likely be paroled before their cases were adjudicated. This, of course, would be acceptable to the radical left, which is promoting the notion that nothing a man does in prison should affect his chances for parole—a position that must be destructive, ultimately, to the safety of the ordinary citizen.
>
> "The phrase 'or some other person of his choice' can be extremely mischievous if construed to permit representation by fellow prisoners. The notion that prisoners will be nice to each other if only the warden would stop being oppressive is much favored by today's liberal reformers. The liberal position of yes-

teryear, however, that no prisoner should be allowed power over another, still seems sound to most prison administrators. Representing another prisoner in legal matters is a most coercive form of such power." ("An Act to Provide for Minimum Standards for the Protection of Rights of Prisoners," WASHINGTON UNIVERSITY LAW QUARTERLY, Summer 1973, p. 613.)

The Association of State Correctional Administrators during the year 1972 developed basic Policy Guidelines in eight important areas including disciplinary procedures and mail. The guidelines concerning serious misconduct are as follows:

"MAJOR VIOLATIONS:

"Every inmate charged with more serious misconduct should appear before the institutional disciplinary committee. Severe penalties, such as forfeiture of good time or extended confinement in punitive segregation, should only be imposed after a hearing before the disciplinary committee.

"An employee observing such misconduct should file a written report with a designated official prior to a hearing. The report should detail the nature and circumstances of the rule infraction.

"A supervisory officer should review each misconduct report and determine appropriate placement for the inmate pending the disciplinary hearing. Inmates involved may be confined apart from the general population awaiting action of the disciplinary committee. He may also request of any staff member additional investigation and information.

"Comments by the reviewing officer may be included with the misconduct report. This might include the results of investigation, statement of extenuating cir-

cumstances, or any other relevant evidence. A recommendation to dismiss the charges or proceed with the disciplinary hearing should be forwarded to the proper official.

"The institution may refer the matter to the proper authorities for prosecution. Such referral should not preclude institutional action against the inmate.

"HEARINGS:

"NOTICE:

"There should be adequate notice to the inmate of the alleged violation of institutional rules at a reasonable length of time prior to the hearings. Such notification should be documented.

"PREPARATION FOR HEARING:

"The inmate should be brought before the disciplinary committee as soon as practical. The committee may order further investigation of the alleged rule violation. Such investigation is to be completed as expeditiously as possible. The inmate may be granted, upon his request, reasonable additional time to prepare for the presentation of his case.

"COMMITTEE COMPOSITION:

"The committee should be composed of a minimum of three persons, representatives of the institutional staff appointed by the institutional head.

"The person who reported the rule violation and the person who has investigated the incident should not be members of the committee.

"INVESTIGATION:

"The relevant facts concerning the alleged rule violation should be made known to the inmate prior to the time of the hearing. The inmate should be given an opportunity to admit, explain, or refute the allegation.

"If the committee determines that significant additional information should be obtained from other persons, these persons should be contacted and this information should be considered by the committee before a final decision is made.

"FINDINGS AND DISPOSITION:

"After the committee has decided that all relevant information has been brought before it, the committee should dismiss all persons except those on the committee and carefully weigh the information. Written findings of the committee should be made after deliberation is completed. The disposition should be made appropriate to the needs of the individual and the institution. The individual should be informed promptly of the final decision of the committee, and of his right to appeal.

"RECORDS:

"Adequate record keeping is essential to prevent the appearance of arbitrary action and to provide a sound foundation for future judgments.

"Except where otherwise provided, there should be a record of every incident involving inmate disciplinary problems. A permanent copy of this record should be maintained in the inmate's file.

"Record of all later reviews of disciplinary action should be placed in the inmate's file with notation of action taken.

"REVIEW AND APPEAL:

"Each inmate should have the right to a review of any decision with which he is dissatisfied. The head of the institution should automatically review all decisions which result in serious consequence to an inmate, such as, loss of good time or punitive confinement.

"In review, the head of the institution may take the following actions:

"1. Confirm the decision.

"2. Order further or new proceedings.

"3. Reduce or suspend punishment.

"The head of the institution should not increase the amount of punishment.

"The inmate should be notified of the result of the final review of his case.

"If the inmate remains dissatisfied with the decision, after review by the head of the institution, he should have the right to appeal to the head of the correctional system.

"At the conclusion of any disciplinary action, including the termination of any restrictive confinemet which may have been imposed, an inmate may be reviewed by the regular classification process to determine if any change in assignment is appropriate. This process should not be considered a disciplinary action nor a punishment.

"The distinction between the disciplinary process and the classification process should be clearly defined and should not be permitted to become blurred." (UNIFORM CORRECTIONAL POLICIES AND PROCEDURES, The Association of State Correctional Administrators, 1972, pp. 12-15.)

In another study of professional persons interested in penal administration, but with few participants actually being employed as correctional administrators or staff, we find the following concerning prison disciplinary procedures:

"Because a prison is so volatile, and because it confines some of the most embittered and dangerous men

in our society, the problems of internal criminal justice are particularly troublesome. At least three kinds of offenses and issues are involved: (1) offenses against other inmates; (2) offenses against the administration; (3) offenses by administrators against inmates.

"Minimal due process would seem to require at least an impartial tribunal, the right to cross-examine and confront hostile witnesses, and the right to present one's own witnesses. Without these three elements, how can any fair hearing take place? And the stakes are very high: a possible loss of good time that may impose additional imprisonment for years, transfer to an even worse institution, loss of privileges, confinement to segregation, loss of a tolerable or good job or study assignment, an obstacle to parole, to mention but a few. And because there are so few good things in prison, the loss of any of these is particularly painful.

"Some courts have indeed agreed to allow these elements, while others, such as the United States Court of Appeals for the Second Circuit and Judge Wyzanski, here in Boston, have refused.

"Let us suppose that the Supreme Court orders that *all* disciplinary proceedings have all three elements. What impact will that really have?

"In the first place, there will probably be a massive guard strike, for the guards will feel threatened by such a set of procedures and understandably. Today, a guard's word against an inmate is never or rarely questioned, no matter what the setting or offense. Whether such acceptance is necessary to maintain security I doubt that anyone knows. But guards and some judges—Judge Wyzanski, for one—have made it abundantly clear that they think it would be very detrimental to prison discipline for an inmate even to challenge a guard on cross-examination. Many inmates, knowing their weak position vis-a-vis a pos-

sibly vindictive guard, administration or parole board, may avoid such a challenge.

"For the same reason, it may be especially difficult to get favorable witnesses to talk.

"Moreover, how impartial will the tribunal be? If it is part of the prison system, and if the matter involves either an offense against the administration or by a guard against an inmate, is real neutrality at all likely? Will an inmate's word ever be accepted over a guard's by a member of the correctional department? Hearing examiners completely outside the system are not even being seriously considered. But even if such outsiders were used, with luck we might be able to achieve the level of the lowest municipal criminal courts in our large cities, where police perjury is so rampant and successful. That's hardly an inspiring goal, though it would certainly be an improvement." ("Prisoners' Rights: Some Hopes and Realities" by Herman Schwartz, Professor of Law, State University of New York at Buffalo; A PROGRAM FOR PRISON REFORM, The Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 9-10, 1972, pp. 53-54.)

Even the above report omits any reference to representation by counsel in such proceedings.

A recent and interesting study was commenced in June 1970 by the Center for Criminal Justice of Harvard Law School into the impact of a Federal District Court decision in *Morris v. Travisono,* 310 F. Supp. 857 (D. R. I. 1970), which established comprehensive procedural regulations for disciplinary matters in the Rhode Island Adult Correctional Institution (A. C. I.). The field work for the study was conducted from June to August of 1970 in which a sample of 460 disciplinary records from both

the maximum and medium-minimum facilities were examined. The records covered periods both before and after the entry of the *Morris* decree. A total of 58 disciplinary proceedings were monitored and some 60 inmates were interviewed. Staff members were also interviewed and related court proceedings were monitored. The results of the study are documented in THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY & POLICE SCIENCE.

The *Morris* decree mandated classification counselors as the representatives of the inmates at disciplinary board hearings. This did not seem to work out satisfactorily because the counselors were also employees of the institution. The report then goes on and touches upon the problem involved in the present case:

> "An alternative to using correctional staff for representational purposes might be to use outside counsel, but this, also, presents a number of problems. Outsiders, especially those assuming an adversary role, are often viewed with hostility and suspicion by the staff. Their 'interference' in prison affairs is resented, and they are seen as a threat by the staff, who fear any undermining of their authority and the possibility of civil liability suits against them. These fears might lead the staff to bypass the formal disciplinary process, where they would be subjected to counsel's investigation and interrogation, either by disciplining the inmates informally or by ignoring infractions of the prison rules. Outside counsel is also resisted because of a fear that Board proceedings will be transformed into criminal trials. A number of staff members felt that the decree already went too far in that respect:

> "'The fallacy is in instituting court procedures in the ACI hearings. We are not a court. . . . There are too many confusing technicalities in the order.
>
> "'The entire order is wrong as to discipline. The system should not be so formal. The average inmate is glad to get his court appearance over. He can then relax and do his time. However, with the new system, it is like he is always going back to court. The average inmate doesn't want to bother with such a formal system.'
>
> "Moreover, if retained counsel were permitted, equal protection problems would be raised regarding indigent inmates who could not afford such counsel. Finally, given the institutional de-emphasis on the entire fact-finding process, legal representation at Board hearings may not in fact be necessary in all disciplinary cases. To provide for such legal representation in particular cases would be tantamount to refocusing the disciplinary inquiry." (THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY & POLICE SCIENCE, Vol. 63, No. 2, June 1972, p. 200.)

The following table from said study is most interesting. While the report does not attempt to explain the table, the argument that is frequently advanced by prison administrators that too much regulation on the prison authorities would result in more difficulty in handling the inmates seems to be justified since over nearly the same number of months before the decree and after the decree, misconduct after the decree increased almost three-fold.

Table 4. Misconduct Before and After the Decree

Misconduct	Date of Misconduct 7-69—3-10-70 Before	3-11-70—10-70 After
Trouble with Guards	27 (35%)	64 (31%)
Fighting/A & B	12 (15%)	47 (22%)
Refusals	12 (15%)	32 (15%)
Escape	1 (1%)	0 (0%)
Poss. Prohib. Articles	1 (1%)	15 (7%)
Alcohol, Drugs	2 (3%)	14 (7%)
Creating a Disturbance	0 (0%)	9 (4%)
Out of Place	0 (0%)	14 (7%)
Destruction of State Property	4 (5%)	4 (2%)
Throwing Food Out of Cell	14 (18%)	0 (0%)
Fire in Cell	2 (3%)	1 (1%)
Larceny of Table	2 (3%)	0 (0%)
Violating Security Rules	1 (1%)	1 (1%)
Cutting Wrists	0 (0%)	1 (1%)
Carrying Protest Sign	0 (0%)	5 (2%)
Total Number of Infractions	78 (100%)	207 (100%)

(THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY & POLICE SCIENCE, Vol. 63, No. 2, June 1972, p. 200,216.)

In a study conducted under a grant from the Law Enforcement Assistance Administration the South Carolina Department of Corrections has published a 100 page document, copyright 1973, entitled INMATE GRIEVANCE PROCEDURES. (Available from said department.)

This report acknowledges assistance to the regular staff from Attorneys General, correctional administrators, wardens, correctional officers and inmates from various state institutions through information provided through questionnaires.

On the question of representation at disciplinary hearings, it states at page 26 thereof:

"Certainly, departments of correction would be hard pressed if forced to provide trained legal counsel for inmates facing disciplinary charges. The practical impossibility of meeting this requirement for the ma-

jority of indigent inmates who could not afford to retain their own counsel points to the need for an alternate approach. In Virginia, South Carolina, Michigan, the District of Columbia, and a few other states, lay advocates or prisoner representatives have been selected to fill this requirement. The South Carolina regulations provide:

> " 'If an inmate so requests, he will be provided with someone to assist him in preparing his case to present to the Adjustment Committee. At the Central Correctional Institution, Manning Correctional Institution, and Harbison Correctional Institution for Women, person(s) will be employed in this capacity. At the outlying institutions, members of the staff (excluding correctional officers) will be available to provide assistance for the inmates. A list of staff members who are available to represent the inmate will be available to the inmate. If the inmate does not wish to be represented by the next person on the list of employees, he may reject this person and select the next person on the list. However, the inmate will not be permitted to randomly select anyone on the list he wants to represent him. The persons who will assist the inmates will be fact finders in that their responsibility will be to interview the inmate, his witnesses, and other persons involved in the particular incident so that the representative may attempt to determine exactly how the incident occurred; he will be expected to present his findings to the Adjustment Committee as he determined from his investigation.'

"While any counsel substitute may lack the necessary advocate qualifications that guarantee proper representation, this can only be determined with experience. Interestingly, the Virginia system has included other inmates in its list of advocates who can be called on to represent another prisoner before an adjustment committee.

"In the District of Columbia, a 'Lawcor' project provides legally trained staff to handle the defense in discipline cases at the Lorton Institution. Oregon follows a similar procedure at one institution. In Michigan, prisoner advocate proceedings provide representation as follows:

> "'In all maximum security disciplinary cases, a resident is entitled to the assistance of a prisoner's advocate if he feels he needs help in preparing his defense to the charges of misconduct. He must request the services of a prisoner's advocate from the Reviewing Superior Officer, Control Center Administrator, or Disciplinary Block Supervisor prior to the day he is scheduled for a Disciplinary Committee hearing. The resident shall be informed of availability of this service in writing at the first review of his case.
>
> "'It shall be the responsibility of the Deputy Warden to maintain a listing of staff members, both Custody and Treatment, who will be assigned as prisoner's advocate on a rotating basis. Associate Counselors, Corporals, Sergeants, and Lieutenants will be eligible for listing; and the representation on the available list will be equally divided between Custody and Treatment.
>
> "'It shall be the responsibility of the prisoner's advocate to confer with the resident charged with misconduct prior to the Disciplinary Committee hearing; to make reasonable investigations of the resident's claims; and assist the resident in presenting his defense at the Disciplinary Committee hearing.'

"These internal reforms are all interesting variations on the basic concept of adequate representation, and go far towards ensuring that a fair hearing takes place for inmates charged with misconduct." (INMATE GRIEVANCE PROCEDURES, Law Enforce-

ment Assistance Administration, South Carolina Department of Corrections, 1973.)

Even the NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS section on CORRECTIONS, which admittedly is not necessarily attempting to set forth what the law or constitutions require in corrections but its "hopes that its standards and recommendations will influence the shape of the criminal justice system in this nation for many years to come" recognizes in its standard for disciplinary proceedings in a correctional facility that counsel substitutes are the most it can hope for—in its Standard 2.2 which states:

> "In the exercise of the foregoing rights:
>
> "* * * * * *.
>
> "3. Counsel substitutes may provide representation in proceedings or matters described in foregoing items 4 (disciplinary proceedings in a correctional facility) and 5, (civil legal problems relating to debts, marital status, etc.) provided the counsel substitute has been oriented and trained by qualified attorneys or educational institutions and receives continuing supervision from qualified attorneys." (Parenthetical phrase added.) (CORRECTIONS, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS.)

In the commentary explaining the Standard points out:

> "Recognizing the large and probably unmanageable burden on existing attorney resources, the standard validates supplemental use of lay assistance (law students, trained correctional staff, 'jailhouse lawyers,' or other paraprofessionals) even in matters requiring/

formal attorney representation. In this regard, a recent judicial observation in a California case dealing with right to counsel in parole revocation is instructive. The ruling, *In re Tucker*, 5 Cal. 3d 171, 486 P. 2d 657, 95 Cal. Rptr. 761 (1971) stated:

> "Formal hearings, with counsel hired or provided, for the more than 4,000 parole suspensions annually would alone require an undertaking of heroic proportions. But that is only the beginning. For if there is a right to counsel at parole revocation or suspension proceedings, no reason in law or logic can be advanced why a prisoner, appearing before the Adult Authority as an applicant for parole and seeking to have his indeterminate sentence made determinate, should not also have legal representation. The conclusion is inescapable that my dissenting brethren are in effect insisting upon counsel for a potential of 32,000 appearances annually: 28,000 parole applicants and 4,000 parole revokees. This monumental requirement would stagger the imagination." (CORRECTIONS, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS.)

Of course, when adding the inmate population of the United States to the above figures the proposition of furnishing lawyers admitted to the Bar for disciplinary proceedings becomes not only unrealistic but impossible.

Summary of Argument 1.

As to what process is due in a revocation of parole hearing this court specifically provided that an informant would not have to be subjected to confrontation and cross-examination if the hearing officer determined he would be subjected to the risk of harm. The court also specifically, as pointed out previously, refused to decide the question

of whether the parolee is entitled to the assistance of retained counsel or to appointment of counsel if he is indigent.

In discussing the question of counsel at probation revocation hearings in *Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 41 L. W. 4647, 93 S. Ct. 1756, in relation to the possible cost and time, this court pointed out:

> "* * *. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial." (*Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 665.)

Noting that in the mid 60's there were an estimated average of 20,000 adult felony parole revocations and 108,000 adult probation revocations each year. We know of no specific figures of the number of serious misconduct reports filed against the entire prison population of the United States, but it would undoubtedly be so high as to keep the entire lawyer population of the United States working full time. And as noted earlier, if counsel were only appointed in certain types of misconduct this would open the door to untold thousands of civil rights cases where counsel was denied. Furthermore, a clerk's office would have to be established in each penitentiary to handle the filing of legal papers by the attorneys, extended delays in scheduling problems would result, attorneys would have to be hired to represent the prison staff, etc. etc. As mentioned by some of the writers, what would happen would undoubtedly be that the guards would stop filing misconduct reports and the inmates would gain another

foothold on having their own way in running the prison. Because of the much less liberty involved, and the untold thousands of disciplinary measures taken daily of persons in prison, the case by case approach of *Gagnon v. Scarpelli* is completely unsatisfactory and uncalled for in prison. Attorneys should not be permitted in said proceedings, period! Furthermore, the court in *Gagnon v. Scarpelli, supra,* recognized that the due process right to counsel of a parolee or probationer was less than the accused at a criminal or juvenile trial because of the very fact that such person has been convicted. Similarly, in the case of prison inmates the due process right is less than the parolee or probationer for the reason that he does not have freedom outside the walls and that he will have been placed in said penitentiary either through a due process hearing by the committing court or the due process hearing of the parole or probation revocation board. See *Gagnon v. Scarpelli*, 36 L. Ed. 2d 656 at 666.

2. Who initially lays down due process rules in prison discipline hearings?

The Honorable Court of Appeals, in its opinion in the present case, also specifically directed the Federal District Court to determine the minimum procedural due process standards in prison disciplinary proceedings. (App. 1, Petition for Writ of Certiorari, p. App-6, App-7, 483 F. 2d 1059, 1064.) This is in direct opposition to the holdings in both *Morrissey v. Brewer* and *Gagnon v. Scarpelli, supra.* In *Morrissey* the court stated:

"We cannot write a code of procedure; that is the responsibility of each State. * * *.

"* * * *.

"We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. * * * *." (*Morrissey v. Brewer*, 408 U. S. 471, 488, 490.)

The same general attitude is followed in *Gagnon v. Scarpelli* as to revocation of probation proceedings. This court stated:

"* * * *. The general guidelines outlined above should be applied in the first instance by those charged with conducting the revocation hearing." (*Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 667.)

3. Inspection of incoming attorney-inmate mail.

The court below, after stating that practical methods exist for insuring that incoming mail is actually from an attorney, stated:

"* * * *. If there is doubt, a simple telephone call should be enough to settle the matter; and the danger that a letter from an attorney, an officer of the court, will contain contraband is ordinarily too remote and too speculative to justify the defendants' regulation permitting the opening and inspection of all legal mail. And the court's order does provide, as we suggested in *Moore*, legitimate means for detecting weapons or escape materials including, in the appropriate circumstances, opening a letter in the presence of the inmate." (Petition for Certiorari, App-1, p. 12; 483 F. 2d 1059, 1067.)

There are several problems involved in the above statement insofar as the prison authorities are concerned. In the first place, if the letter purports to be from an attorney in another state, as many of them are in state penal systems and many more are in the federal penal system, the telephone call is no longer simple and the accumulation becomes quite expensive; in addition, there is no way of knowing that the answering party is genuine.

More important than this, is the statement by the court that letters may be opened in the presence of the inmate in appropriate circumstances. This, to the penal authorities would mean that all letters from attorneys outside the state, whose reputation and background is not easily ascertainable, would constitute appropriate circumstances. A simple regulation on the behalf of the prison authorities to the effect that all incoming mail may be inspected for contraband if done in the presence of the inmate addressee would be the simplest and safest way to handle the matter. There is no adequate remedy that will erase the possible damage after the contraband has gotten in; the remedy must be applied to stop the contraband.

Morris Sigler, then Director of the Division of Corrections and Warden of the Nebraska Penal Complex illustrated the danger when he stated that throughout the years mail has been used for introduction of contraband into institutions everywhere, emphasizing that money and drugs are easily introduced through the mail (A. 6). He also emphasized that money in a penal institution is worth much more than on the street (A. 7).

While the penal authorities are concerned that letterheads of attorneys may be stolen or fictitiously printed, that employees or persons with access to attorney stationery may be the sender or that attorneys themselves may either naively or unscrupulously send contraband by letter, it is interesting to note also that during the 12 years Warden Sigler was at the Nebraska Penal and Correctional Complex he had 5 or 6 Nebraska attorneys as inmates in his institution for the commission of felonies (A. 9, 10).

In *Smith v. Robbins*, 454 F. 2d 696 (C. A. 1st Cir.) the court adopted a rule as contended for here, that mail addressed to the prisoner from a member of the State Bar could be opened for contraband in the presence of the prisoner, the court noting that if the prisoner is present he can see that the letter is not being read and that is enough. We respectfully contend that this is a reasonable restriction upon the right of access to the court and that such a rule is much less subject to abuse and more easily understood by prison officials than the complicated rules set forth by the Honorable Eighth Circuit in the opinion below in the present case.

4. Must state penal authorities furnish legal assistance, or a reasonable alternative, to inmates to prepare civil rights actions as well as habeas corpus suits?

The Honorable Court of Appeals in its opinion below, in considering the requirement of *Johnson v. Avery*, 393 U. S. 483, 21 L. Ed. 2d 718, 89 S. Ct. 747, that before a state could enforce a regulation barring inmates from furnishing assistance to one another it must provide some reasonable alternative, held that the state:

"* * * must take into account the need for assistance in civil rights actions as well as habeas corpus suits." See, *Nolan v. Scafati,* 430 F. 2d 548, 551 (1st Cir. 1970). See also, *Andrade v. Hauck,* 452 F. 2d 1071 (5th Cir. 1971). (App-1, Petition for Writ of Certiorari, p. App-9, 483 F. 2d 1059, 1065.)

This is unquestionably an extension of *Johnson v. Avery, supra,* and would create an immeasurable burden upon the prison systems and Federal Courts throughout the United States.

As this court knows, the specific holding of *Johnson v. Avery, supra,* was:

"* * *. But unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for *post-conviction relief,* it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." (393 U. S. 483, 490.) (Emphasis supplied.)

Furthermore, throughout the opinion the court emphasizes the importance of the "Great Writ" of habeas Corpus. Examples:

"This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme, * * *." (393 U. S. 483 at 485.)

"Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed. * * *." (393 U. S. 483 at 485.)

This court further pointed out that a state may not validly make the writ available only to prisoners who

could pay a four dollar filing fee, citing *Smith v. Bennett*, 365 U. S. 708, 6 L. Ed. 2d 39, 81 S. Ct. 895. That *Ex parte Hull*, 312 U. S. 546, 85 L. Ed. 1034, 61 S. Ct. 640 invalidated a state regulation which required that habeas corpus petitions first be submitted to prison authorities. Further examples are unnecessary; suffice to say that the entire opinion is based upon post conviction actions.

There is no reason to extend the burden of the state, as the Court of Appeals would do, to require it to either permit jailhouse lawyers to operate or to furnish a reasonable alternative for the preparation of civil rights actions, which as this court knows, may include almost any kind of complaint, so long as it is grounded against action by the state or under color of state law. Whether or not this is a good policy, is immaterial. No one has thus far ever suggested that the Constitution requires the furnishing of assistance to free citizens in the preparation of their private legal matters much less extend the same to prison inmates.

The Court of Appeals, in support of its statement that the state must take civil rights actions into account, cited *Nolan v. Scafati*, 430 F. 2d 548, and *Andrade v. Hauck*, 452 F. 2d 1071. Neither of these cases, however, reach the nuts and bolts problem of furnishing a reasonable alternative to permitting inmates assisting other inmates. *Nolan v. Scafati* involved the refusal of the prison authorities to mail a letter to the Massachusetts Civil Liberties Union; *Andrade v. Hauck* involved the refusal of the prison authorities to permit an inmate to write a letter to a judge.

Thus, both of said cases are grounded on the access to the court's doctrine of *Ex parte Hull, supra,* and do not reach the problem of the affirmative duty of the state to furnish a reasonable alternative to permitting prison inmates assisting others as required by *Johnson v. Avery.*

The importance to the state and federal penal systems and the Federal Courts of an extension of *Johnson v. Avery* to include Civil Rights Actions is exemplified by the portions of the following tables:

Table 18. Civil cases commenced in the U.S. District Courts, during the fiscal years 1961 and 1968-72 by nature of suit

Nature of suit	Cases filed						percent change	
	1961	1968	1969	1970	1971	1972	1972 over 1961	1972 over 1971
Prisoner petitions:								
Federal	1,589	2,851	3,612	4,185	4,121	4,179	163.0	1.4
State	1,020	8,301	9,312	11,812	12,145	12,088	1,085.1	−0.5

(ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1972, p. 115.)

Table 19. Prisoner petitions filed in the U.S. District Courts fiscal years 1961 and 1966-72

Type of petition	Fiscal years								Percent change	
	1961	1966	1967	1968	1969	1970	1971	1972	1972 over 1961	1972 over 1971
Petitions by state prisoners	1,020	6,248	7,804	8,301	9,312	11,812	12,145	12,088	1,085.1	—0.5
Habeas corpus	1,020	5,339	6,201	6,488	7,359	9,063	8,372	7,949	679.3	—5.1
Other prisoner petitions	(1)	909	1,603	1,813	1,953	2,749	3,773	4,139	355.3	9.7
Mandamus, etc.	.....	691	725	741	684	719	858	791	.....	—7.8
Civil rights	.....	218	878	1,072	1,269	2,030	2,915	3,348	.....	14.9

(ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1972, p. 117.)

While habeas corpus cases are leveling off, civil rights and other petitions by inmates seem to be continuing upward. There is no valid constitutional reason why penal authorities should have to assist this upward trend.

This court has recently, of course, exhaustively examined the differences between civil rights actions and habeas corpus in *Preiser v. Rodriguez,* 411 U. S. 775, 36 L. Ed. 2d 439, 93 S. Ct. 1827, and the conclusions there reached recognizing the difference in the two types of actions are even more relevant to the question of extending *Johnson v. Avery, supra.*

5. May the Federal Court Order newly devised prison procedural requirements to be applied retroactively?

The Court of Appeals in the instant case stated that it would be appropriate for the district court to order expunged from prison records determinations of misconduct arrived at in hearings that failed to comport with minimum due process requirements. (App. 1, Petition for Writ of Certiorari, p. App-7, 483 F. 2d 1059, 1064.)

In its order denying a rehearing the court went on to state that prison authorities would be given an opportunity to state whether they will provide or permit counsel on those cases which must be reheard for lack of procedural or substantive due process (App. 3, Petition for Writ of Certiorari, p. App-50, 483 F. 2d 1059, 1067).

The Court of Appeals is thus attempting to impose the requirements of *Morrissey v. Brewer*, contrary to *Morrissey v. Brewer* itself, wherein this court stated:

> "* * *. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. * * *." (*Morrissey v. Brewer*, 408 U. S. 471, 490.)

The Sixth Circuit in the case of *Valdez v. Perini*, 474 F. 2d 19, 20-21, and the Seventh Circuit in *Zizzo v. United States*, 470 F. 2d 105, 108, both deferred to the above language of *Morrissey v. Brewer* in applying new prison disciplinary standards prospectively only.

CONCLUSION

For all of the reasons set forth, petitioners respectfully contend that the Court of Appeals' judgment below should be reversed. Petitioners respectfully pray that this court will set forth the broad guidelines as to what process is due, if any, in prison disciplinary proceedings and that such guidelines, if any, should be implimented in the first instance by the prison authorities as to future cases and not by the Federal courts. That the court adhere to its limitation of *Johnson v. Avery* requirements to post conviction remedies and that the extension of such

requirements to civil rights actions by the Court of Appeals should also be reversed. That the case be remanded to the Court of Appeals for Judgment accordingly.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-679

CHARLES L. WOLFF, JR., et al., *Petitioner,*

VS.

ROBERT O. McDONNELL, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AMICUS CURIAE

This case raises questions basic to the control and operation of the states' prison systems. The California Attorney General has an intense interest in these questions. The California Department of Corrections operates nineteen institutions with a total population of 22,000 adults including 1,000 women. In addition, the California Youth Authority has eighteen institutions with a population of 4,500. These institutions range from maximum security to honor camp and

work furlough program. Moreover, there are over 18,000 inmates on parole status.

Much of the litigation in the prison context has arisen in California and virtually every aspect of the operation of this system has been put into issue in the state and federal courts. See for example *Martinez v. Procunier,* No. 72-1465 (presently before this Court) involving mail and paralegal visiting privileges and inmates' right of access to the courts; *Procunier v. Hillery,* No. 73-754, and *Pell v. Procunier,* No. 73-918 (probable jurisdiction noted), inmate and media rights of interview and *Clutchette v. Procunier,* 328 F.Supp. 767 (N.D. Cal. 1971) (Presently before the United States Court of Appeals for the Ninth Circuit), involving the whole question of prison disciplinary procedures. In addition, there has been extensive litigation in the California state courts particularly involving the application of the protections outlined in *Morrissey v. Brewer,* 408 U.S. 471 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), to procedures within the prison environs.

We believe that the problems we face and the solutions the Department of Corrections has advanced will be of interest to the Court.

SUMMARY OF ARGUMENT

In the case of prison disciplinary hearings we argue that a fact finding system based upon an investigation by an independent officer, notice and opportunity to

be heard before an impartial tribunal, the right to present evidence, to receive written findings from the tribunal and to have speedy administrative review, combined with access to the state courts to prevent arbitrary or capricious action, presents the best balance between the nature of the governmental function and the private interests involved. The right to counsel and to cross-examine would not enhance the fact finding process in this peculiar environment and would militate against the prompt and just settlement of rule infractions. But whatever the federal due process right, prison authorities should be required first to delineate minimum standards.

In the case of attorney mail, a balance must be struck between the possible catastrophe of violent escape and possible effects on the right of access to the courts and the constitutional right to counsel in criminal cases. We point out that opening but not reading such mail in the inmates' presence does not even minimally affect any fifth or sixth amendment rights and we document that it substantially assists the prison authorities in dealing with an existent threat.

We suggest some specific guidelines by which Nebraska's inmate assistance program could be judged and finally we argue that whatever standard of due process rights is applied, the factor of "purpose" does not mandate retroactive application whereas the factors of "reliance" and "effect" are strongly in favor of purely prospective application.

ARGUMENT

I

UNDER WHAT CIRCUMSTANCES IF ANY SHOULD THE RIGHT TO COUNSEL BE EXTENDED TO PRISON DISCIPLINARY HEARINGS?

Amicus curiae, the People of the State of California submit that there is no right to counsel at prison disciplinary hearings.[1] We urge that procedures utilizing an independent investigating officer to ascertain the validity of the charges, giving notice of the charges, affording an opportunity to explain and to present evidence on one's own behalf provide sufficient due process in the circumstance, and represent a proper balance between the rights of prisoners[2] and the purposes of officials charged with the responsibility of keeping and rehabilitating those prisoners. These concepts take into account the inherent differences between free society and the prison society; find legal basis in *Braxton v. Carlson,* 483 F.2d 933, 941 (3rd Cir. 1973), and *Sostre v. McGinnis,* 442 F.2d 178 (2nd Cir. 1971); and are consistent with the related matters decided in *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972) (question of counsel not decided), and *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973) (pres-

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[1]"Disciplinary hearings" as used here refers to hearings inquiring into violations of inmate regulations for which punishments such as segregation and loss of privileges may be imposed. The term does not refer to prosecution of criminal offenses nor to hearings for revocation of good time credits or refixing the term of confinement.

[2]Although only the right to counsel is at issue our argument is framed in terms of full due process including the right to confront and cross-examine.

ence and participation of counsel undesirable and constitutionally unnecessary at most revocation hearings).

> ". . . [D]ue process is flexible and calls for such procedural protections as the *particular situation* demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the *precise nature of the government function* involved as well as of the *private interest* that has been affected by governmental action." *Burger, C.J.* in *Morrissey v. Brewer, supra,* at 481. (Emphasis added.)

A. "The Particular Circumstances."

The elements of due process frequently come in a package comprised of notice, impartial hearing, cross-examination, the right to present evidence on one's own behalf, and counsel.[3] This package is usually formulated in the context of a citizen in a free society. Thus, whether the proceedings involved welfare benefits, *Goldberg v. Kelly,* 397 U.S. 254 (1970), or fire marshal investigations, *In re Groban,* 352 U.S. 330 (1957), essential to the result was the assumption that the society, individually and collectively, would not only accept these due process rights but also would discharge the obligations which correspond to them. We note that in *Morrissey* and *Gagnon* due process was evaluated in the context of a free society, *i.e.,* the parolee's environment.

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[3]Even in the free society context, the right to counsel is not always upheld. *In re Groban,* 352 U.S. 330 (1957), *see also Gagnon v. Scarpelli,* 411 U.S. 778 (1973).

By marked contrast, the Court is now asked to extend this familiar package not only to individual prison inmates who have established beyond reasonable doubt their inability to accept the obligations and responsibilities of due process,[4] and who have not yet demonstrated the ability to reach parole status, but more importantly, it is also asked that the rights be upheld in a prison environment entirely unlike that in which the concepts of due process evolved over centuries. It is now demanded that all prison inmates be afforded rights of cross-examination and counsel in disciplinary hearings when experience and indication is that they would not, or if they would, dare not respond with the cooperation and integrity necessary to give meaning to the fact finding process.[5] We ask that this Court recognize that fact finding by the in-

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[4]"In considering plaintiff's claim that the disciplinary procedure at Green Haven denies him due process, we recognize that prison officials are not dealing with a group of genteel citizens noted for their law-abiding characteristics. On the contrary most present a constant threat of unruliness and have already engaged in serious anti-social activities leading to their imprisonment." *Carothers v. Follette*, 314 F.Supp. 1014, 1027 (S.D.N.Y. 1970).

[5]The concept of due process cannot be separated from the nature of the society in which it exists. Although in society at large it is recognized that an individual may often have conflicting loyalties and interests, the law presumes that the diverse interests of society will outweigh such factors, and a fair hearing will result. But how can this system function in prison where each inmate's conduct is entirely governed, willingly or otherwise, by his obligation to an unwritten internal code of conduct which is directly opposed to the concepts of due process? An inmate, whether assailant, victim, or witness cannot be realistically expected to give any but favorable testimony concerning a fellow inmate. For example, we note that a prisoner of some notoriety (Juan Corona) who lost an eye in a recent prison stabbing attack, will not testify against those believed to have taken part in the attack and criminal proceedings have had to be dismissed. This routinely occurs. See Exhibit 1.

vestigating officer concept will better serve the purposes of confinement than the familiar concepts of truth realization by battle of champions.

Nor do we believe that it is an arbitrary classification to recognize the attitude and conduct of prison inmates in this regard. It does not seem illogical for an inmate to forfeit the basic presumptions of credibility he might possess, if only because he is directly confronted by the conflicting rules of internal prison society.[6] More importantly, there is regrettably no reason to believe that full due process participation by inmates, including confrontation and the right to counsel at prison disciplinary hearings will add to the integrity of such hearings, nor improve the correctional process.[7] If we were permitted to make but

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[6]Because of their code of conduct, the credibility of virtually every inmate is questionable. What reason is there for allowing participation in due process hearings when the participants cannot be believed? It is for this reason that *Goldberg v. Kelly, supra,* is not dispositive of this issue. Accepting the reasoning of that case as applied to its particular circumstances, we submit that the context of welfare payments to free citizens is inherently different from the prison situation, if for no reason other than the nature of the prison environment.

[7]Although the entire battery of due process rights is neither necessary nor workable in the prison disciplinary hearing, we acknowledge that certain rights are appropriate. Indeed, we would be totally oblivious to contemporary concepts of corrections if we failed to recognize the sound reasoning of numerous recent cases calling for expansions of due process in this area. Although in a few instances some type of right to counsel has been granted under certain circumstances, *Palmigiano v. Baxter,* 487 F.2d 1280, 1290-1292 (1st Cir. 1973); *Clutchette v. Procunier,* 328 F.Supp. 767, 783 (N.D.Cal. 1971); appeal docketed No. 71-2357, 9th Cir. August 30, 1971; *Colligan v. United States,* 349 F.Supp. 1233, 1238 (E.D. Miss. 1972); most courts which have reached the issue have declined to rule that there is a right to counsel at prison disciplinary hearings. *Sostre v. McGinnis, supra; Braxton v. Carlson, supra; United States ex rel. Jones v. Rundle,* 358 F.Supp. 939,

one point in this brief, we would urge with the utmost emphasis that the free person's due process right of confrontation and counsel is inappropriate in these "particular circumstances" because inmates function according to their own system of conduct which is inconsistent with the underpinnings of due process, and the purposes of the confinement which they are undergoing.

In any event, the cost would be high. During 1973, there were approximately 22,000 inmates in the nineteen institutions of the California Department of Corrections. During the year there were 20,490 disciplinary hearings. See Exhibit 2. Furthermore these figures do not include the 4500 inmates at California Youth Authority institutions, nor the estimated thousands of inmates at county jails and juvenile detention centers. To afford full due process rights, large numbers of persons would have to be employed just to staff the hearings, and many more would be required to replace correctional personnel called to testify at such hearings.[8] Our position is that the rights advanced by counsel and cross-examination would be minimal as compared to the excessive burden on the

946 (E.D.Pa. 1973); *Collins v. Hancock*, 354 F.Supp. 1253, 1259 (D.N.H. 1973); *Gates v. Collier*, 349 F.Supp. 881, 895 (N.D.Miss. 1972). The foregoing is by no means exhaustive of the recent cases on this issue. Nevertheless, the majority have declined to grant the right to counsel and we believe that they are based on sounder reasoning.

[8]State court decisions in this area may have substantial unexpected side effects. For example, preliminary indications are that recent decisions such as *In re Prewitt*, 8 Cal.3d 470, 503 P.2d 1326 (1972), may have caused a reduction in the number of paroles granted, perhaps due to a new found reluctance to set a parole date until a reasonable certainty of continued inmate rectitude has appeared.

machinery of prison administration, security, and rehabilitation.

B. "Nature of the Governmental Function."

Since the disciplinary hearing is not a criminal prosecution, there is no Sixth Amendment right to counsel, *Kirby v. Illinois,* 406 U.S. 682, 688 (1972). If there is a right to counsel at disciplinary proceedings, it must spring from the due process clause, and

> "[d]ue process of law, as we comprehend it, does not necessarily include or exclude representation by counsel. The substance of due process may be denied although the accused is represented by a coterie of counsel, yet he may have it although unaccompanied by counsel."
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> *Amrine v. Tines,* 131 F.2d 827, 833 (10th Cir. 1942).

To determine whether counsel is required, the security, deterrent, disciplinary, and rehabilitative functions of the disciplinary hearing must be examined.

A primary responsibility of officers is to prevent escapes, assaults, and other misconduct. The summary disposition of rules infractions is essential to the identification and isolation of potential problems. The major problem can be prevented by prompt and certain response to the minor infraction. The ability to act promptly is essential, and the summary disciplinary hearing serves that purpose well. To subject the proceedings to adversary concepts would formalize and slow the response and seriously impair the ability of prison officials to carry out their responsibility to maintain security.

Discipline is directly related to the concept of security. It is established by knowledge of the inmates that rules infractions will be promptly dealt with. It is diminished by interposing procedural obstacles to prevent its operation. It is also diminished by allowing full confrontation rights and permitting cross-examination and interrogation of prison officials by inmates. There is a need for respect of authority of prison officials which is not enhanced when they are subjected to interrogation by inmates ostensibly designed to show possible bias or prejudice against the inmate.[9] It seems clear that if the right to counsel, who presumably will be bound to exercise his familiar techniques, has any effect on prison discipline, such effect will be neutral at best and adverse in all but the most stable of institutional environments.

> "We believe, therefore, that the transformation of this informal hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses and written record could be self-defeating. We are apprenhesive of the volatile effect such adversarial proceedings could have on internal prison control and stability. We fear that prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point by formal

[9]In 1973, California institutions averaged over 50 disciplinary hearings every day of the year. We see no more need for allowing a prisoner to routinely interrogate his custodian than there is for allowing a serviceman to routinely question the decisions of a commander. As opposed to the normal witness for whom an appearance in court is an event, the staff member must appear many times at disciplinary hearings and must continue to live in a most intimate relationship with the inmate. It is most unwise to strain unduly this continuing relationship. *Cf. Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

adversarial proceedings often involving varying shades of minor infractions."

Braxton v. Carlson, supra, at 941.

The rehabilitory function of the disciplinary hearing has been judicially recognized. A prison disciplinary committee

". . . is not merely a guilt adjudicating disciplinary body. It is also part of the rehabilitation and correctional system for determining the institutional program and service to which the inmate should be referred."

Id. at 939.

In summary, the prison disciplinary hearing is a complex proceeding with separate but interrelated functions. To allow prisoners, through assistance of counsel, to question routinely in formal proceedings the decisions of prison officials in the case of an infraction unrelated to the criminal process would destroy the ability to accomplish several of those functions.[10]

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[10]Because the nature of the disciplinary hearing is essentially non-judicial, we question what use counsel would serve. ". . . . [F]ormal rules of evidence would be entirely inappropriate at a disciplinary proceeding. To dispose sensitively and carefully of each prisoner's unique case with due regard for the effect of each decision on the total fabric of the prison community, prison authorities must have wide access to relevant information. Since, in addition, there is no likelihood that substantial rights would be sacrificed if a prisoner failed, for example, to raise a proper objection or to take a timely appeal, the need for legal skill is less acute here than in *Mempa* . . . ." *Sostre v. McGinnis, supra,* at 196.

At current disciplinary hearings there is neither prosecution nor defense counsel. The proceeding is not adversary but investigative. Imposition of counsel rights would require counsel for both sides and thus require a hearing officer. Equal protection

C. "The Private Interest."

The private interests which may be *directly* affected by disciplinary hearings concern present conditions of confinement for limited periods: isolation, segregation, confinement to quarters, extra duty, and suspension of various privileges. Private interests which may be *indirectly* affected include custody status, access to work assignments, and length of confinement through redetermination of sentence and loss of good time credits.[11]

D. The "Balance."

Although the precise scope of the rights retained by the inmate has never been delineated with precision, it seems fair to say that the nature of the rights retained is necessarily limited by considerations underlying the penal system. *Sostre v. McGinnis, supra,* at 188. There must be a balancing mechanism to weigh the conflicting interests. The criterion is whether the absence of full confrontation rights "lacks support in any rational and constitutionally acceptable concept of a prison system." *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062 (9th Cir. 1973).

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would demand that indigents have appointed counsel. The nature of the entire process would change from summary investigative determination to judicial proceeding. Rather than shaping the hearing to match the function, it would be allowing the hearing to shape the function.

[11]Length of confinement may be indirectly affected because the factual determinations made at disciplinary hearings may be introduced later at hearings on determination of sentence and good time credits. The "good time credit" concept is not applicable in California. Calif. Penal Code section 2926.

The trend for some time has been to place on society the burden of justifying the deprivation of individual rights. However correct that burden in free society, we submit that it is misplaced in the prison environment. Acknowledging that upon conviction a person does not lose all constitutional rights, we nevertheless question the premise that the prison administrator must justify the conditions of confinement. This seems to shift the burden in the matter to the wrong party. It subsumes the concept of a main line inmate as a norm and then proceeds to question the justification for more rigorous confinement. Rather than presuming that prison officials are acting appropriately, it presumes the contrary by requiring them to justify their actions to a reviewing court vis a vis prisoners who have established beyond a reasonable doubt the necessity for their confinement, in an environment where the disinterested non-staff witness is non-existent. We do not assert that prison officials are infallible, nor prisoners incorrigible; however, as between the two, the presumption of correctness must of necessity lie with the officials. We are not dealing with citizens presumed innocent or with ex-felons who have "paid their debt," or even, as in *Morrissey* and *Gagnon,* with parolees who have given indications of rehabilitation by achieving conditional release. We are dealing with incarcerated persons on whom the pressures not to give meaningful cooperation are almost overwhelming. Nevertheless, these persons seek to require society to justify the absence of every procedural due process right. We submit that society discharges the initial burden by showing the fact of

conviction by jury and sentencing to prison by judge, and by demonstrating the general inmate response. The burden is now on the inmates to show why they are entitled and ready to use the rights they seek. An individual inmate can discharge that burden by reaching the conditional freedom of parole. Until such time, we submit that the nature of private interests does not require counsel nor the right to cross-examination when compared against the adverse effect that these would have on the basic purposes of confinement.

II

SHOULD THE STATE PENAL AUTHORITIES OR THE FEDERAL DISTRICT COURT LAY DOWN MINIMUM PROCEDURAL DUE PROCESS REQUIREMENTS FOR DISCIPLINARY HEARINGS IN PENAL INSTITUTIONS IN THE FIRST INSTANCE?

The law on this point has been clearly stated:

> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, *the States have an important interest in not being by passed in the correction of these problems.* Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled

by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances."

Preiser v. Rodriguez, 411 U.S. 475, 491-492 (1973). (Emphasis added.)

". . . [W]e think it inadvisable for a federal court to pass judgment one way or another as to the truly decisive consideration, whether formal due process requirements would be likely to help or to hinder in the State's endeavor to preserve order and discipline in its prisons. . . ."

Sostre v. McGinnis, supra, at 197.

Also see: United States ex rel. Miller v. Twomey, 479 F.2d 701, 713, 719 (7th Cir. 1973); *Biagiarelli v. Sielaff,* 483 F.2d 508, 512 (3rd Cir. 1973).

As previously noted, California has over 25,000 inmates in institutions ranging from maximum security prisons to rural conservation camps. The experienced authorities who operate these diverse institutions are in the best position to prepare regulations for disciplinary hearings tailored to fit the required level. Federal courts should limit their function to striking down unconstitutional regulations and, upon request, offering guidelines for amended regulations.[12] This procedure comports with traditional concepts of our form of government by separating the executive func-

[12]In many instances states have granted greater rights than those required by federal courts. See *In re Prewitt, supra.* If federal courts are to write state procedures in the first instance, it seems likely that the tendency of states to grant additional rights in the future will be reduced.

tion of establishing laws from the judicial function of determining their constitutional validity. Furthermore it adheres to the principles of federal and state comity by recognizing the competence, expertise, and experience of state officials, as well as the requirement that they function effectively in the first instance.

> "Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen state authorities. . . . Presumably that body [the state officials] . . . possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals. . . . it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges. . . ."
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> *Railroad Commission of Texas v. Rowan and Nichols Oil Company,* 311 U.S. 570, 575-576 (1941).

The California Department of Corrections has adopted an elaborate set of regulations pertaining to all aspects of prison administration, including the procedures at issue here. Such regulations were prepared by experienced correctional personnel and are under constant review by State courts. They take into account the capabilities, objectives, and limitations of the Department of Corrections and its numerous institutions, and are compatible with numerous other regulations pertaining to the classification and assignment of inmates. It is our belief that intermittent

code construction by federal district judges will have an adverse effect on the administration and operation of the Department of Corrections, seriously impair the federal state relation, and blur the traditional line between the judiciary and executive. Consequently, the federal courts, in cases affecting the operation of state prison systems, should first require the state prison authorities to delineate the limits of the constitutional process.

III

PRISON OFFICIALS SHOULD BE PERMITTED THE POWER TO OPEN INCOMING ATTORNEY MAIL IN THE PRESENCE OF THE INMATE ADDRESSEE; THE MAIL, UNREAD, SHOULD BE OPENED TO ENABLE THE DETECTION OF CONTRABAND NOT OTHERWISE DISCOVERABLE BY METHODS SHORT OF OPENING.

We again proceed to attempt an identification of the private interests of the inmate and of the nature of the governmental function, and to balance these conflicting interests.

What, initially, are the interests of the prisoner? Although his abstract right to receive *mail* from attorneys carries First Amendment implications, the more operative fact is that it is mail *from attorneys* with which we deal. The Fifth and Sixth Amendment implications are paramount; we sound the themes of access to the courts [insofar as that access is enhanced by *confidential* attorney-inmate communication] and of the general guarantee to "effective" assistance of counsel, *McMann v. Richardson,* 397

U.S. 757, 770-772 (1969),[13] [*if* confidentiality is a constitutionally compelled accouterment thereof in the prison context].

Similarly, there are the interests of society to consider. One interest is internal security. It is a sad fact that the pressing importance of this interest is most graphically demonstrated only after the fact, when security has broken down. Before catastrophe, the need for security is not a need which may be succinctly described; the recourse must be to a largely inarticulable fund of knowledge premised on past experience. Commentators have pointed out that prisons justify their needs only in the most general terms. Note, *Prison Mail Censorship and the First Amendment,* 81 Yale L.Jour. 87, 91-92 (1971); *see also Coleman v. Peyton,* 862 F.2d 905, 906-907 (4th Cir. 1966), *cert. denied* 385 U.S. 905 (1967); *but see Palmigiano v. Travisono,* 317 F.Supp. 776, 783 (D. R.I. 1970). To cavil at the generality of the justification, however, misses the point; the fatal specifics which are reasonably subsumed within that generality are the crux of the matter.

A second such interest is the orderly, daily administration of the prison. The administrators must be given flexibility in the discharge of their duties, for theirs is the intimate contact with the inmates necessary to cause the ultimate rehabilitation of the in-

[13] Even the "general guarantee to assistance" of counsel has been described as of absolute scope only for the defendant in a criminal trial, during that proceeding and through direct appellate review of it. It is not the profession which constrains the privilege but the function.

mates. *Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969). A retort often heard is that such "unfettered" flexibility is inevitably abused. There is an obvious reply: the record herein does not demonstrate such abuse, as the district court specifically noted. 342 F.Supp. at 619. Also, proof of abuse in rare instances does not rebut the general need for flexibility, as it must be presumed until demonstrated otherwise that the flexibility is fairly administered. Abuses, where they are shown to exist, may be rectified, *e.g., Barnett v. Rodgers,* 410 F.2d 995 (D.C.Cir. 1969).

The nature of the "contraband" determines which societal interest is affected in any isolated case. For example, the reception by an inmate of a hacksaw blade is counter-productive to the security interest, and the reception of money by him similarly disrupts the orderly administration of the prison. Thus, it is impossible to determine abstractly the extent to which any societal interest is threatened; it is for this reason also that prison officials can no more than generally outline the interests.[14] To believe otherwise is to

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[14]By definition, our concern is with detection of contraband not otherwise discoverable, as by tactile manipulation, magnetic examination or black light inspection. 342 F.Supp. at 622-623.

It is not clear from the opinion below whether either method could detect drugs on the paper within, especially if the paper were folded over, etc. Such folding would also make impossible the tactile discovery of contraband such as money, hidden within the folds of the letter paper. What may be easily discoverable adhering to the envelope, that is, may not be so if it is adhering to the paper sealed within and folded over. As this brief was in preparation, officials at California's Folsom Prison intercepted two halves of a hacksaw blade enclosed in an envelope containing, appropriately enough, blank habeas corpus forms. The envelope was addressed, by prepaid postage, from the Federal District Court Clerk's Office, Central District of California. The interception

assume they can anticipate the technological advances and weaponry sophistication available as "contraband". *See e.g., United States v. Roche,* 443 F.2d 98, 99 (10th Cir. 1971) (supplemental phallic appendage capable of firing projectile).

Having identified the interests involved, it remains to consider how those interests would be affected by adoption of a particular procedure. How would the interests of both sides be affected were the opposing side's most *extreme* proposition adopted? By analyzing thus, the limits of any effect to be expected would be identified; and the proper constitutional levels of due process delineated.

Custodial personnel might seek to *stop* incoming attorney mail absolutely. The salutary result is obvious: no contraband would reach the prisoner via the mails from attorneys. But what of the effects on the prisoners' rights heretofore identified? If the prisoner may not receive mail from his attorney, the First Amendment problem is obvious, but is better dealt with in other contexts. Certainly no one has yet denied the right of society to read inmates' social mail. [See *Procunier v. Martinez,* No. 72-1465, presently pending.] Less obvious is the asserted Sixth Amendment impingement: the attorney may not fully

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occurred February 22, 1974, in the prison's maximum security section, the *only* section in the prison where scientific equipment capable of such detection was in use. Consequent upon this discovery, other envelopes from the same source were examined and further blades were discovered. Finally, a round carbide blade, normally more difficult to detect under black light examination, was discovered sealed under the flap of the first piece of "confidential mail" from the same court. (This blade's purpose is similar to that of the hacksaw blade, but it is considerably more efficient.)

correspond matters of strategy by mail for fear it will be read by the officials and the contents communicated, presumably to his adversary. *See Adams v. Carlson* 488 F.2d, 619, 630-631 (7th Cir. 1973).

Even if all attorney mail is stopped, however, the Fifth Amendment infringement is not at all clear. Once the Fifth Amendment right of access to the courts is effectively ensured by the appointment of counsel in a particular case, the confidentiality of communication by mail advances the right only marginally. It has been persuasively suggested that the inmates' right of access to the courts is threatened, not by the act of censorship, but by any reprisals prisons may inflict upon the inmate for his reception of mail. *Note,* 81 Yale L.Jour. at 98, fn. 70. Thus, the true Fifth Amendment issue is present only to the extent that reprisals are shown to exist. That showing can be made in only one way, by recourse to the record in the instant case. The district court below found no such reprisals. 342 F.Supp. at 319. An important point emerges: the Fifth Amendment access rights of the prisoner are not threatened here even were Nebraska officials to argue for the most extreme censorship measures.

Inmates would, of course, argue for completely free reception of incoming attorney mail, assuming it to be such.[15] The danger to prison interests from an un-

[15]The opinion of the Court of Appeals considers in haste the problem of so determining, arguing that in doubtful cases, a phone call could be made to the attorney's office. 483 F.2d at 1067; *see also Marsh v. Moore,* 325 F.Supp. 392, 395 (D.Mass. 1971).

Other, more precise procedures could be suggested. First, to be certain an attorney-client relation did exist, *see Elie v. Henderson,*

supervised procedure is that introduction of contraband in incoming mail from attorneys would disrupt prison security and/or internal administration. Courts have not been receptive to the pleas of prison officials, the prevailing feeling being that the danger unscrupulous attorneys will attempt to pass contraband is "remote," given that attorneys are officers of the court and bound by a code of professional ethics. *See, e.g., Adams v. Carlson, supra,* 488 F.2d at 632; *McDonnell v. Wolff, supra,* 483 F.2d at 1067; *Moore v. Ciccone, supra,* 459 F.2d at 578; *Marsh v. Moore, supra; Palmigiano v. Travisono, supra; In re Jordan, supra,* 7 Cal.3d 930, 938-939, 500 P.2d 873.

Thus must be examined the validity of this "assumption". As attorneys, we do this with a profound sense of the delicacy involved. However, to characterize the possibility of miscreant attorney action as "remote" without more is incomplete analysis. It neglects the fact that but *one* miscreant may cause a disaster out of all proportion to his number. That disproportionality, indeed, is the keynote of guerrilla warfare and nuclear disasters. Attorney Stephen Bingham is currently under indictment by a Marin County, California, grand jury for his lone involvement in the San Quentin Prison gun smuggling incident which led to the violence of September 1971, a disaster which left six dead. Another California at-

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340 F.Supp. 958, 960 (E.D.La. 1972), the attorney could be required to register with the prison, submitting a copy of his signature. Second, to minimize the danger of unauthorized usage of his personal stationery, he could be required to write "LEGAL MAIL" and sign on the envelope. *See generally In re Jordan,* 7 Cal.3d 930, 500 P.2d 873 (1972).

torney has been identified in court testimony by convict Ronald Beaty as the source of hacksaw blades which were smuggled into prison via the route of "attorney-client" mail, secreted beneath dummy legal folders. Beaty subsequently escaped, aided by other outside elements, leaving one unarmed prison guard dead. Attached hereto as Exhibit 3 is the testimony of Beaty concerning the incident. [*People v. Burt and Burt,* San Bernardino Superior Court No. CR-28514]. Further, the danger has been judicially recognized. *Elie v. Henderson, supra,* 340 F.Supp. at 960-967; *see also* Note, 81 Yale L.Jour., *supra,* at 99 and fn. 73; *Lee v. Tahash,* 352 F.2d 970 (8th Cir. 1965); *see also* n. 14, *ante.*

In our case, however, it is a middle ground which is before this Court. Nebraska now seeks approval of a procedure whereby incoming attorney mail may be opened in the addressee's presence[16] and inspected for the existence of contraband not otherwise discoverable. It is difficult to perceive a violation of any

[16]The presence of the inmate operates to lessen a Sixth Amendment argument made against the opening of attorney mail. It has been argued that opening mail out of the inmate's presence may make him think the prison officials are seeking to discover the legal details of his defense. As such, the opening may exert a psychological effect on the confidentiality of the attorney-client relationship. *See generally Smith v. Robbins,* 454 F.2d 696 (1st Cir. 1972). If, however, the inmate is present and the letter not read, this psychological barrier dissolves. This procedure is presently allowable under California law. (Cal. Pen. Code § 2600(2); *In re Jordan, supra,* 7 Cal.3d at 938 and fn. 4, 500 P.2d 873.) We would only add that the guard ought to be allowed to compare the signature on the letter with that which, we have suggested (n. 15, *ante*), should be on file with the prison. This provides a final verification that the letter is from the attorney.

The argument is also weakened to the degree [n. 13, *ante*] there is not a right to confidential inmate-attorney communication.

inmates' constitutional rights, no matter how expansively those are stated. The mail is *not* read; the confidentiality problem (if it exists in the abstract), already lessened by the inmate's presence, is nullified. If the fear is the opening itself, without reading, would exert a "chilling effect" on the overall attorney-client relationship, we think that a nebulous supposition. *Cf. Laird v. Tatum,* 408 U.S. 1, 11-14 (1972); *Adams v. Carlson, supra; compare Smith v. Robbins, supra.* But even if abuse or inadvertence occurred, the reader could be prevented from testifying as to the contents. The Fifth Amendment objection is a false one generally; here, it is especially false, as reprisals, which depend upon knowledge of the mail's content, are impossible.

What of the effect of this position on the prison interests heretofore identified? Such a compromise operates in the light of an inescapable fact: it cannot keep out *all* contraband. The task—the real balancing task——is *to reduce to within acceptable limits* the so-called "remote" danger that contraband may be smuggled in through the medium of attorney mail. *Marsh v. Moore, supra,* 325 F.Supp. at 395.[17] The

[17]We must take issue with the district court's requirement that authorities show a "real possibility" the contraband is present. 342 F.Supp. at 625. To so require makes the true balancing process hopelessly one-sided. Given that attorneys in the past have smuggled in contraband and that the potential damage threatened to society in any one case is greater than that to any one inmate whose mail is opened but not read, the added requirement of "real possibility" further skews the balancing toward the prisoner's interests, while totally neglecting those of society. In effect, society is required to articulate a danger which is inarticulable save on the general basis of past experience. An analogous requirement would be one by a court of a "real possibility" that

opening of the envelope and inspection of the letter, *see in re Jordan supra,* 7 Cal.3d at 938-939 500 P2 873; *see also Sostre v. McGinnis, supra,* 442 F.2d at 199-200, reduces to acceptable limits the danger from that avenue of contraband introduction into a prison.

It remains only to articulate the balancing mechanism by which this solution may be defined. Because the primary aspects of this case concern the Fifth and Sixth Amendments, the mechanism must be related to those aspects. Particularly the Sixth Amendment attorney-inmate confidentiality problem, assuming, *arguendo,* the existence of a constitutional right to that confidentiality, must be balanced, again in the context of the prison setting. The proper inquiry is, whether this proposal "lacks support in any rational and constitutionally acceptable concept of a prison system"; *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062, 1065 (9th Cir. 1973); *Sostre v. McGinnis, supra,* 442 F.2d at 199-200, whether it is "unjustified and unreasonable with respect to the needs of prison restraint and discipline." *Wilson v. Prasse,* 463 F.2d 109, 113 (3d Cir. 1972). The procedure this

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anyone entering an oral argument before it is carrying contraband before he be searched for same. However, before oral argument before the California Supreme Court, *all* are searched; the diminution of their Fourth Amendment rights is slight. The justification for the search is more realistically based on California's tragic past experience, rather than on any manufactured concept of "probable cause" or "consent".

We note that this "open and shake" procedure will prevent neither the escape plan nor the obscene nor the calculated appeal to immediate violent insurrection. *Elie v. Henderson,* 340 F.Supp. 958 (E.D.La. 1972). These risks could be obviated by the nomination of a "confidential reader" bound by regulation not to discuss content. See 8 Wigmore, Evidence § 2317 at 618 [McNaughton Revision 1961].

Court ought permit is neither unjustified nor unrelated to those interests, it recognizes the inchoate nature of dangers to those needs. Failure to so recognize is the weakness of the Court of Appeals' holding on the issue, which holding ought now be disavowed. *Compare Sostre v. McGinnis, supra.*

IV

THIS COURT SHOULD PROVIDE GUIDELINES BY WHICH THE QUESTION, WHETHER THE NEBRASKA "INMATE ASSISTANT" PROGRAM IS A "REASONABLE ALTERNATIVE" WITHIN THE CONTEMPLATION OF JOHNSON v. AVERY, 393 U.S. 483 (1969), MAY BE ANSWERED ON REMAND IN THE DISTRICT COURT.

Neither one-word answer which this Court could give to the abstract question presented, whether *Johnson v. Avery,* 393 U.S. 483 (1969), is as applicable to Civil Rights Act cases as to habeas corpus actions,[18] would be responsive to the true shortcoming

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[18]In practical terms, the issue may already have been determined, and *Johnson* applied in the civil rights context. There are few explicit pronouncements, *compare Cruz v. Beto,* 405 U.S. 317, 325 n. 3 (1972) (dissent of Rehnquist, J.) (*Johnson* not applicable beyond habeas corpus context); *Leeper v. Birzgalis,* 314 F.Supp. 808 (W.D.Mich. 1969) (same) *with Sczerbaty v. Oswald,* 314 F. Supp. 571, 573 n. 2 (S.D.N.Y. 1972) (*Johnson* applies to prisoner suits brought under Civil Rights Act), but there are reasons which suggest the issue has already, *sub silentio,* been determined.

a. *Johnson* itself arose in what has subsequently been described as a "civil rights" context. *Dixon v. Jacobs,* 427 F.2d 589, 595 n. 10 (D.C.Cir. 1970); *see also Breard v. Alabama Board of Corrections,* 413 F.2d 455 (5th Cir. 1969) (regulation identical to that struck down in *Johnson* voided in suit brought under 42 U.S.C. § 1983). Since *Johnson,* the distinction between habeas corpus jurisdiction and civil rights jurisdiction has tended to blur, leading to an overlapping applicability of the two actions to many

in the Court of Appeals' opinion. Whichever answer be found to the theoretical issue,[19] the case must still be remanded to the district court for a determination of whether the Nebraska "inmate assistant" program is a "reasonable alternative" (to inmate legal assistance for other illiterate inmates)[20] within the contemplation of *Johnson v. Avery, supra.* The guidelines provided for the making of that determination are so general as to be non-existent. *See* 483 F.2d at 1065. Accordingly, this Court should enunciate the factors relevant to the district court's ultimate exam-

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prison situations. *Wilwording v. Swenson,* 404 U.S. 249, 251 (1971); *but see Preiser v. Rodriguez,* 411 U.S. 493 (1973).

b. This overlapping renders difficult the strict limitation of *Johnson* to habeas corpus, since many prison actions involving a *Johnson* problem are brought under the Civil Rights Act. Federal courts have been quick to further blur the distinction between the two types of action. *See, e.g., Williams v. Richardson,* 481 F.2d 358, 360 (8th Cir. 1973); *Andrade v. Hauck,* 452 F.2d 1071, 1072 (5th Cir. 1971); *Hudson v. Hardy,* 424 F.2d 854, 855 n. 3 (D.C. Cir. 1970); *International Prisoners' Union v. Rizzo,* 356 F.Supp. 806, 808-809 (E.D.Pa. 1973); *Park v. Thompson,* 356 F.Supp. 783, 789 (D.Haw. 1973).

c. The need for access to the courts, the motivation behind *Johnson,* may exist as strongly in the civil rights context as in the habeas corpus context. *In re Reynolds,* 356 F.Supp. 1253, 1256 (E.D.Wis. 1973); *Carothers v. Follette,* 314 F.Supp. 1014, 1022 (S.D.N.Y. 1970); *see Campbell v. Beto,* 460 F.2d 765 (5th Cir. 1972); *Corby v. Conboy,* 457 F.2d 251 (2d Cir. 1972).

[19]This assumes the issue exists at all, since the Nebraska regulation is not absolute, as was the Tennesee regulation considered in *Johnon v. Avery.* This point was noted by the district court below. 342 F.Supp. at 621. Similar "without permission" regulations have been held reasonable under *Johnson. Sostre v. McGinnis,* 442 F.2d 174, 201 (2d Cir. 1971); *Wells v. McGinnis,* 344 F.Supp. 594, 597 (S.D.N.Y. 1972).

[20]*Johnson's* concern is with the illiterate inmate. Access to the courts for literate inmates is guaranteed by the existence of adequate law libraries and writ preparation facilities within the prison. *Younger v. Gilmore,* 404 U.S. 15 (1971). A regulation which permits assistance to "illiterates," but not otherwise, would be proper under *Johnson. But see Wainwright v. Coonts,* 409 F.2d 1337, 1338 (5th Cir. 1969).

ination of the Nebraska "alternative." The enunciation of those factors would have the additional benefit of providing the states with some indication of the form such "reasonable alternatives" ought assume. It must be remembered that it is the states' function to set up a "reasonable alternative" form of legal assistance for illiterate or perhaps inarticulate inmates should they choose to bar any form of assistance by literate inmates, as part of their basic responsibilities for their prison systems. *Preiser v. Rodriguez, supra,* 411 U.S. at 500.

The Court of Appeals held only that, upon remand, it would be the burden of the state to demonstrate a "reasonable alternative" exists,[21] and that the meeting of that burden would require the state to produce ". . . evidence establishing in specific terms *what the need is for legal assistance* . . . in civil rights actions as well as habeas corpus suits." 483 F.2d at 1065 [emphasis in original] [citations omitted]. The above language does not provide the state with any idea of the type of evidence required of it to demonstrate this need; all that is said is that the evidence must be "specific."

What must the state show to carry its burden of demonstrating that a "reasonable alternative" exists; what factors are of importance? The fundamental factor would seem to be the actual size of the *illiterate* inmate population in the particular facility, since

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[21]As a preferred right is involved, this burden has been placed on the state. *Novak v. Beto,* 453 F.2d 661, 664 (5th Cir. 1971), *rehearing denied,* 456 F.2d 1303 (1972); *Dreyer v. Jalet,* 349 F. Supp. 452, 484 (S.D.Tex. 1972).

it is against the backdrop of this statistic that the effectiveness of any program must be evaluated. The importance of that statistic has been noted, Note, *Constitutional Law: Prison "No Assistance" Regulations and the Jailhouse Lawyer,* 1968 Duke L.Jour. 343, 347-348, 360-361 (1968); and updated statistics could be expected.

Once the size of the affected "class" is known,[22] the emphasis must shift to evaluation of the effectiveness of the alternative, in two respects. The first inquiry is as to the delay, if any, which occurs between the time the inmate makes known his desire for assistance and the time his grievance is considered within the prison. *Williams v. United States Dept. of Justice, Bureau of Prison,* 443 F.2d 958, 960 (5th Cir. 1970). Whether a delay of any particular duration is "reasonable" must, of course, be evaluated on a case-by-case basis, given the multitude of correctional facilities and their individualized situations. *Johnson v. Avery* recognized that the state could impose "reasonable" limitations on inmate legal assistance. 393 U.S. at 490. Any alternative can be evaluated in general "reasonableness" terms as to effectiveness in *commencing* to render assistance.

Somewhat more difficult is an evaluation of the effectiveness of the "alternative" in *completing* assis-

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[22]The analytic task is akin to that of determining the class discriminated against in an equal protection of the laws case. If this "class" is not precisely determined, holdings result which find a given number of lawyers for *an entire inmate population* not a "reasonable alternative." *Dreyer v. Jalet, supra,* 349 F.Supp. at 483-484. That holding neglects the literacy of an undetermined percentage of the inmate population.

tance, *i.e.*, getting the inmate's case to court if that is the necessary forum. Many "grievances" must be dealt with summarily; a simple explanation of a previously-unclear rule of fact is the requisite "remedy." *See* Note, *supra,* 1968 Duke L.Jour. at 359; *see also Novak v. Beto,* 453 F.2d 661, 664 (5th Cir. 1971). It would be helpful to know the percentage breakdown of grievances which must go to court, as compared to those which need not. *Novak v. Beto, supra; see generally* Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 Kansas L.Rev. 493 (1970). Once again, the keynote of the evaluation must be "reasonableness."

To some extent, the number of lawyers, law students, or paralegal personnel involved gives an indication of how well the state is carrying its burden of providing a "reasonable alternative." *Cf. Novak v. Beto, supra; Jacob v. Sharma, supra.* If it appears the number of personnel is large enough to handle the illiterate inmate legal need, the burden would shift to the prisoners' position to demonstrate the contrary, as with statistics concerning past legal actions, and the extrapolations to present "need" derived therefrom.

One final point must be recognized: it is "assistance" to gain access to the courts rather than full legal "representation" in the courts which must be furnished the inmate. *Johnson v. Avery, supra,* 393 U.S. at 490; *see In re Harrell,* 2 Cal.3d 675, 688; 87 Cal.Rptr. 504 (1970). The state's obligation does not

extend beyond a fair presentation of the courts of the inmate's factual claim. In either the civil rights context, *see Haines v. Kerner,* 404 U.S. 519 (1972); *see also Cruz v. Beto,* 405 U.S. 319, 322 (1972); or the habeas corpus context, it is that factual presentation which guarantees the court access sought in *Johnson v. Avery, supra.* The tendency, recognized in *Johnson v. Avery,* of inmates to abuse the grievance procedure, *see also United States v. Simpson, supra,* makes most unrealistic any requirement that the state represent the inmate throughout the judicial progress of his action.[23] *Cf. Boyd v. Dutton,* 405 U.S. 1, 7 (1972) (dissenting opinion); *Guajardo v. Luna,* 432 F.2d 1324, 1325 (5th Cir. 1970).

V

NEW FEDERALLY IMPOSED DUE PROCESS REQUIREMENTS FOR STATE PRISON DISCIPLINARY HEARINGS SHOULD BE PROSPECTIVE ONLY.

The fifth question for review by this Court is whether a federal court may impose new due process procedural requirements retroactively. The circuit court opinion in *McDonnell v. Wolff,* 483 F.2d 1059 (8th Cir. 1973), summarily authorized expungement of apparently all disciplinary reports not meeting its new standards, thus giving its decisions full retro-

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[23]This representation requirement is particularly unrealistic in the civil rights action context, given the full, plenary civil nature of such an action. *Cf. Landman v. Royster,* 333 F.Supp. 621, 644 (E.D.Va. 1971); Justice, *Prisoners' Litigation in the Federal Courts,* 51 Tex.L.Rev. 707, 712-713 (1973).

active effect. 483 F.2d at 1064. Considering the immense upheaval this portends for the prison records and administration of a state such as California, we urge close attention to this question.

A. The Case for Prospectivity.

In *Linkletter v. Walker,* 381 U.S. 618, 622-625, 629 (1965), this Court firmly rejected the purely declaratory theory of law. In so doing it placed the question of retroactive versus prospective application of newly declared constitutional requirements on a balance of equities most succinctly expressed in *Stovall v. Denno,* 388 U.S. 293 (1967):

> "The criteria guiding resolution of the question implicate (a) the *purpose* to be served by the new standards, (b) the extent of the *reliance* by law enforcement authorities on the old standards, and (c) the *effect* on the administration of justice of a retroactive application of the new standards." 388 U.S. at 297. (Emphasis added)

See also *Linkletter v. Walker, supra,* at 629; *Tehan v. Shott,* 382 U.S. 406, 410 (1966).

1. "Purpose."

The most important of these factors is the purpose of the new standards. *Desist v. United States,* 394 U.S. 244, 249 (1969); see *Adams v. Illinois,* 405 U.S. 278, 283 (1972). And the purpose most strongly indicating retroactivity is one directed to the very integrity of the fact-finding process, one involving a clear, ineluctable danger of convicting an innocent man. *Linkletter v. Walker, supra,* at 639; *Adams v. Illinois,*

supra, at 280; *Johnson v. New Jersey*, 384 U.S. 719, 727-728 (1966); *Stovall v. Denno, supra*, at 297-298. If the new rule corrects fatally untrustworthy findings and proceedings, it operates retroactively regardless of the inconvenience and reliance on old rules. *Adams v. Illinois, supra*, at 280; *Desist v. United States, supra*, at 251-252.

"Reliance" and "effect," however, have become increasingly important as the Court has recognized both the existence of degree in the assurances of fair proceedings and the multiple, often prophylactic purposes to its new rules. *Desist v. United States, supra; Johnson v. New Jersey, supra*, at 729; *Tehan v. Shott, supra*, at 416; *Michigan v. Payne*, 412 U.S. 47, 51 (1973). Hence, it stated in *Linkletter:*

> "All that we decide today is that though the error complained of might be fundamental, it is not of the nature requiring us to overturn all final convictions based upon it." 381 U.S. at 639-640.

And it most recently reiterated in *Gosa v. Mayden*, 413 U.S. 665 (1973):

> "At the same time, however, the fact that a new rule tends incidentally to improve or enhance reliability does not in itself mandate the rule's retroactive application." 413 U.S. at 680.

See also *Halliday v. United States*, 394 U.S. 831, 832-833 (1969).

To urge the necessity of prospectivity, we therefore need not utterly refute any beneficial effect new rules

may have on the reliability of fact-finding in disciplinary hearings. Some of the due process rights in some cases may *arguendo* enhance the reliability of findings. They may lessen the possibility that man suffer improper loss of privileges or increased custody due to an erroneous determination. However, particularly in a jurisdiction such as California, where orderly fact-finding procedures based on independent staff investigation have long been in effect, the other "purposes" for the imposition of yet more formal disciplinary procedures may be found to be as significant and as desirable. These purposes include: (a) increasing the "visibility" of prison disciplinary proceedings by a record of proceeding or findings of fact so that courts may more easily intervene when it is appropriate that they do so and so that the public may be assured that arbitrariness, if any, can be checked; (b) exercising a cautionary effect on prison administrators to assure fairness in handling matters in their discretion even as *Miranda v. Arizona,* 384 U.S. 436 (1966) (made prospective in *Johnson v. New Jersey, supra*) served to shape police practices; and (c) improving the rehabilitative factor whereby the inmate involved in a discipline incident knows he is treated promptly as well as fairly and that infractions will meet with prompt and measured response. *Braxton v. Carlson, supra,* at 941.

The California experience has been that the fact-finding procedure, based upon reasonable notice, the impartial board, the independent investigative officer, and the opportunity to present the inmates version,

gives rise to reliable findings of fact. These findings are now subject to administrative review by grievance procedure. In addition, inmates have long had recourse to the writ of habeas corpus, and, if appropriate, evidentiary hearings if they were treated arbitrarily or capriciously. *Cf. In re Harrell,* 2 Cal. 3d 675, 684, n. 3, 693; 87 Cal.Rptr. 504 (1970) cert. denied 401 U.S. 914. This continuing ability to challenge the defect which is further remedied by new rules, has often been found significant to the decision to make a rule prospective. See, e.g., *Halliday v. United States, supra,* at 833.

The factor of "purpose" in this case is, therefore, not definitive and a fair resolution of the retroactivity question requires consideration of the factors of reliance and effect.

2. "Reliance."

Case law has given no reliable warning to prison officials of new due process standards. Many cases have required notice and hearing, often including mention of an impartial tribunal. They frequently specifically rejected any claim to counsel or rights of confrontation and cross-examination.[24] Where permitted, some have added nuances such as a verbatim

[24]See, e.g., *Sostre v. McGinnis,* 442 F.2d 178, 194-199 (2d Cir. 1971); *Biagiarelli v. Sielaff,* 483 F.2d 508, 511-512 (3rd Cir. 1973); *Braxton v. Carlson,* 483 F.2d 933, 940 (3rd Cir. 1973); but *cf. United States ex rel. Jones v. Rundle,* 358 F.Supp. 939, 946-947 (E.D. Pa. 1973); *Benfield v. Bounds,* 363 F.Supp. 160, 163-164 (E.D.N.C. 1973) (summarizing law of other circuits); *United States ex rel. Miller v. Twomey,* 479 F.2d 701, 715-717 (7th Cir. 1973); and see reasoning in *Clements v. Turner,* 364 F.Supp. 270, 281-282 (D. Utah 1973).

recording; and some have gone on to require the ability to call favorable witnesses, written findings of fact, and even use immunity.[25] Finally, some few cases have gone so far as to suggest that an inmate may utilize retained counsel or a counsel substitute to effectuate his other rights. They have thereby evoked Equal Protection claims to a right to counsel at all disciplinary hearings, claims still unresolved.[26] The case of *Clutchette v. Procunier*, 328 F.Supp. 767, 785 (N.D. Cal. 1971) which went as far as a right to counsel or counsel substitute was by its own terms stayed pending an appeal (9th Cir. No. 71-2357, August 30, 1971) and is still undecided.

In this swirl of conflicting opinions on the scope of due process at disciplinary hearings, few cases specifically discussed the question of retroactivity; and the few that did discuss it, disagreed. Ranging over the spectrum of possible results, some held new rules prospective to hearings held after the new decision (see, e.g., *Clements v. Turner, supra,* at 282; *Palmigiano v. Baxter, supra,* at 1293) and some imposed full retroactivity (see, e.g., *United States*

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[25]See, e.g., *Collins v. Schoonfield*, 344 F.Supp. 257, 274 (D. Md. 1972); *Collins v. Hancock*, 354 F.Supp. 1253, 1259 (D. N.H. 1973); *United States ex rel. Neal v. Wolfe*, 346 F.Supp. 569, 574-575 (E.D. Pa. 1972).

[26]See, e.g., *Bundy v. Cannon*, 328 F.Supp. 165, 172-173, 176 (D. Md. 1971); *Colligan v. United States*, 349 F.Supp. 1233, 1236-1239 (E.D. Mich. 1972); *Landman v. Peyton*, 370 F.2d 135, 140 (4th Cir. 1966); *Landman v. Royster*, 333 F.Supp. 621, 651-654, 657 (E.D. Va. 1971); *Palmigiano v. Baxter*, 487 F.2d 1280, 1288-1291 (1st Cir. 1973); *Pearson v. Townsend*, 362 F.Supp. 207, 221-224 (D. So. Car. 1973); *Cf. Cottle v. Wainwright*, 477 F.2d 269, 272-273 (5th Cir. 1973); *Wainwright v. Cottle*, 94 S.Ct. 221 (1973).

ex rel. Jones v. Rundle, supra, at 952; *Landman v. Royster, supra,* at 657). Some have utilized a functional variety of partial retroactivity whereby new standards are applied if the disciplinary punishment is still being served or the disciplinary incident is the basis for initiation of new action against an inmate by custodial or parole agencies. (See e.g., *Adams v. Carlson,* 488 F.2d 619, 628-629 (7th Cir. 1973); *Collins v. Hancock, supra,* at 1259; *Colligan v. United States, supra,* at 1239-1240; see especially *In re Harrell, supra,* at 692-693.) In the Ninth Circuit, the case of *Clutchette v. Procunier, supra,* at one point speaks of the 1969 welfare case of *Goldberg v. Kelly*[27] being determinative (328 F.Supp. at 779), then later speaks as if a functional retroactivity will touch only the most recent incidents (at 784), and finally speaks of expungement in terms suggesting total retroactivity of new rules to all disciplinary incidents in an inmate's file (at 785).

Not only have disciplinary cases given no sure guide as to the scope or retroactive application of new rules, but new decisions from this Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) have not warned prison officials of change in disciplinary rules. *Morrissey* by its own terms stated new rules would be applied to future revocations and spoke in the future tense. 408 U.S. at 485-490. It specifically stated:

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[27]397 U.S. 254 (1969).

> "Although the parolee is often formally described as being 'in custody,' the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." 408 U.S. at 483.

Gagnon v. Scarpelli, too, speaks in the future tense. 411 U.S. at 782, n. 4, 787-788, 790. It, too, speaks of protecting liberty. 411 U.S. at 781. And furthermore, it institutes a conditional right to counsel to effectuate the procedures *Morrissey* set forth. 411 U.S. at 783, 786.

In sum, all that prison officials could divine from existing law was a difference of opinion on the process due in disciplinary proceedings. For failing to guess the new procedural rules ultimately imposed, they ought not to be faulted with the severe effects full retroactivity would bring about. *Williams v. United States,* 401 U.S. 646, 663 (1971) (concurring opinion of Justice Brannan); *Adams v. Illinois, supra,* at 283; *Desist v. United States, supra,* at 248.

3. "Effect."

This is not a field where: "That which was constitutionally invalid could be isolated and excised, without requiring the State to begin the entire fact-finding process anew." *Robinson v. Neil,* 409 U.S. 505, 510 (1973). Full retroactivity would have a devastating impact.

In judging retroactivity, this Court has considered it significant that innumerable cases would have to

be reheard, that the State's administration of justice would be tremendously burdened, and that this would occur despite the fact that prior proceedings may have been reasonably accurate and the rights involved subject to scrutiny by the courts. See, e.g., *Linkletter v. Walker, supra,* at 637; *Michigan v. Payne,* 412 U.S. 47, 55 (1973); *Johnson v. New Jersey, supra,* at 730; *De Stefano v. Woods, supra,* at 634-635.

California has well over 22,000 inmates in prison and over 18,500 on parole. Just in the year 1973, California's adult penal institutions had over 20,000 disciplinary incidents serious enough to warrant a report and hearing (Exhibit 2). If new procedural rules were retroactive, we see no check on a widescale demand that all disciplinary incidents in an inmate's file be either expunged or reheard. And this would be demanded on the speculative effect of such incidents on classification and parole matters possibly years removed from the incident itself.[28] Expungement, assuming the millions of man-hours necessary to its completion could be mustered, would substantially hinder prison administrators' informed exercise of discretion regarding classification based on case histories reliably compiled under then-existing rules. Rehearings held long after punishments and reclassifications had occurred would be immensely

[28]Cases such as *McDonnell v. Wolff, supra,* and *United States ex rel. Jones v. Rundle, supra,* at 951-952, have shown an extreme lack of appreciation of the almost impossible burden retroactivity would impose in a large prison system.

costly in time and man-power for the sake of a speculative benefit to the inmate. On the theory that it may possibly affect conditions or duration of their parole, even parolees under such a rule would be entitled to challenge disciplinary incidents in their files which may go back for years.

In conclusion, we submit that the factor of "purpose", including as it does multiple, often prophylactic purposes, does not mandate retroactivity and that the factors of "reliance" and "effect" make it clear that prospective application of new rules is the only equitable result.

B. The Problem of Partial Retroactivity.

The question of partial retroactivity arises due to this Court's occasional application of otherwise prospective rules to certain extant cases. Partial retroactivity has extended the benefit of new rules to cases still pending on direct review, to cases in which trials have not yet begun, to cases in which the tainted evidence has not yet been introduced, and of course to the litigants in the case before the Court. See *Desist v. United States,* 394 U.S. 244, 256-257 (1969) (dissent of Justice Harlan) citing *Linkletter v. Walker, supra; Tehan v. Shott, supra, Johnson v. New Jersey, supra, Fuller v. Alaska,* 393 U.S. 80 (1968); *Stovall v. Denno, supra;* and *De Stefano v. Woods,* 392 U.S. 631 (1968). The doctrine, while pragmatic, has been attacked as an historical accident and as arbitrary. The doctrine's birth was in cases where the Court had already applied the new rule in

question without discussion of retroactivity.[29] Its arbitrariness has been decried in several dissents. See *Desist v. United States, supra,* at 255; *Mackey v. United States, supra,* at 676, 713-714; *Linkletter v. Walker, supra,* at 640-641. As applied to new procedures for disciplinary hearings, the rule of partial retroactivity bogs down in a morass of unanswered problems.

First, the familiar signposts of retroactivity analysis, which have hitherto been utilized in criminal procedure, are not present in a prison disciplinary hearing. For example, "pending on direct review" cannot be used since the direct state court review is usually through writ of habeas corpus and after exhaustion of administrative remedies. A given state prison system may even have no regular institutional appeal. Second, the function and nature of the hearing in question is unlike the criminal trial. It does not look at an isolated criminal event, but perpetually reviews a man's history from every aspect. Its fact-finding component is immersed in an overwhelmingly dispositional purpose. Third, even attempts at func-

[29]See *Linkletter v. Walker, supra,* at 622, noting *Mapp v. Ohio,* 367 U.S. 643 (1961) had already been applied in *Ker v. California,* 374 U.S. 23 (1963); *Fahy v. Connecticut,* 375 U.S. 85 (1963) and *Stoner v. California,* 36 U.S. 483 (1964) and *Tehan v. Shott, supra,* at 409, n. 3 noting that *Griffin v. California,* 380 U.S. 609 (1965) had been applied to *O'Connor v. Ohio,* 382 U.S. 286 (1965). See also "The Supreme Court—1964 Term, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law," Paul J. Mishkin, 79 Harv. L.Rev. 56, 76 (1965); *Linkletter v. Walker, supra,* at 628-629; *Williams v. United States,* 401 U.S. 646, 652 (1971); *Johnson v. New Jersey, supra,* at 732.

tional partial retroactivity (discussed *supra*) present the spectre of interminable litigation. Inmates will claim that an incident in fact serving only as context was really the critical factor that prompted the challenged action. They will claim that a merely contextual incident tipped the balance against them. It might even be claimed that the Court's partial retroactivity rule is being evaded by dishonest description of an incident as context, rather than as initiating or deciding charge. Functional retroactivity is therefore not a workable rule upon which either inmate or prison administrators can confidently rely.

In conclusion, as this Court stated in *Desist v. United States, supra,* at 253, the reasons against full retroactivity mitigate also against partial retroactivity. We, therefore, submit that any new due process requirements should be prospective to disciplinary hearings held after the date of their imposition.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed and the case remanded for further proceedings not inconsistent with the principles argued above.

Dated, San Francisco, California,
March 8, 1974.

EVELLE J. YOUNGER,
Attorney General of the State of California
JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division
EDWARD P. O'BRIEN,
Assistant Attorney General
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Deputy Attorney General
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APRIL P. KESTELL,
Deputy Attorney General
H. F. WILKINSON,
Deputy Attorney General
Attorneys for
Amicus Curiae.

(Exhibits Follow)

Exhibit 1

Office Of The District Attorney
Room 155, Hall of Justice
San Rafael, California 94803

Bruce B. Bales
District Attorney

Telephone
479-1100

March 7, 1973

Warden Louis S. Nelson
California State Prison
San Quentin, California

Re: Nathan Ellis, B-28124
Timothy Earl Dudley, B-33524
Willie Smith, Jr., B-22127

Dear Warden Nelson:

I have reviewed the investigative report forwarded by your Department. This is a very close case against Ellis and Dudley due to their discovery in a cell which was out of bounds, containing two screw drivers and other circumstances. There would appear to be no substantial evidence against inmate Smith.

I feel that the evidence, though strong against Dudley and Ellis, is insufficient to take before a jury for the primary reason that the victim refuses to testify. Initially, his refusal was somewhat qualified, but on March 5, 1973, my investigator, D. H. Howell, contacted him at San Quentin to ascertain whether he would or would not testify in this case and was informed by inmate Coumpy that he definitely would

not testify. Another factor involved is that if the informants, who gave information to Officer Spoon and Sgt. Wilkes were actually eye witnesses to the incident, their names could be discovered by the defense if charges were actually filed.

For the above stated reasons we decline to prosecute in this case and the matter is referred back to you for disposition.

Very truly yours,
Bruce B. Bales
District Attorney
Joshua W. Thomas
Assistant District Attorney

JWT:p

Exhibit 2

(Letterhead of
State of California—Health and Welfare Agency
Department of Corrections
Sacramento

Ronald Reagan, Governor)

March 5, 1974

Honorable Evelle Younger
Attorney General of California
300 McAllister Street
San Francisco, California 94102

Dear Sir:

SUBJECT: Population/Disciplinary Statistics—1973.

Records and files in this office, and information received from the various institutions, show the following totals:

Institution	1973 Population	1973 Disciplinary Hearings
Sierra Conservation Center	2,085	1,584
California Conservation Center ...	721	479
California Correctional Institution	1,150	1,314
California Mens Colony	2,616	2,766
California Medical Facility	1,961	1,449
California Rehabilitation Center ..	1,617	1,712
Correctional Training Facility	2,667	3,147
Deuel Vocational Institution	1,505	2,511
Folsom	2,037	1,199
San Quentin	3,096	2,727
California Institution for Men	2,102	940
California Institution for Women ..	929	662
Total	22,486	20,490

Sincerely,
/s/ L. M. Stutsman
for R. K. Procunier
Director of Corrections

Exhibit 3

TESTIMONY OF BEATY

[988] Q. (By Mr. Canty) Did he [a recently released inmate] tell you how he was going to get them to you?

A. Yes.

Q. What did he tell you?

A. That [an attorney] would bring them to me.

Q. [The attorney] is his attorney you mentioned yesterday?

A. His attorney, yes.

Q. Did [the attorney] ever bring any hacksaw blades?

A. Yes, sir.

Q. Do you remember about when that was?

A. I believe it was the latter part of August or the first part of September, to the best of my recollection.

Q. And how did he deliver them to you?

A. They were in an envelope taped and to the back of a manuscript covered underneath a dummy legal document.

Q. In case anybody doesn't know, what is the use of a hacksaw blade in the prison?

A. To saw the bars off for an escape.

Q. And did you give those hacksaw blades to somebody before you left the prison?

A. Before what?

Q. Before you left the prison on October 8?

[989] A. Yes.

Q. Whom did you give them to?

A. Inmate named Palmer.

Q. Do you recall how many blades you received?

A. 24.

FILE COPY

FILE
APR 2 19
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., etc., *et al.*,

Petitioners,

v.

ROBERT O. McDONNELL, etc.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., etc., *et al.*,

Petitioners,

v.

ROBERT O. McDONNELL, etc.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The citation of the opinions below is adequately set forth in the Brief of Petitioner at 1. The opinions below may also be found at the Petition for Writ of Certiorari, Appendix-1, -2, and -3, APP-1 through 47.

JURISDICTION

The grounds on which the jurisdiction of this Court is involved are adequately set forth in the Brief of the Petitioners at 1-2.

QUESTIONS PRESENTED

Whether the inmates of the Nebraska Penal and Correctional Complex (the Complex) are entitled to minimum due process when faced with the possibility of suffering "grievous loss" at the hands of the Complex Adjustment Committee in prison disciplinary hearings and, if so, what is minimum due process; whether constitutional standards appropriate to prison disciplinary hearings should be restricted to solely prospective application; whether the Complex regulations for handling inmate-attorney mail meet constitutional standards; and whether the inmate legal assistance program of the Complex meets constitutional standards.

STATUTES INVOLVED

The constitutional and statutory provisions set forth in the Brief of the Petitioners at 2-6, and in addition:

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Also Act of June 25, 1948 c. 646, 62 Stat. 964; Act of May 24, 1949 c. 139, §111, 63 Stat. 105; Act of August 28, 1954, c. 1033, 68 Stat. 890; Act of July 7, 1958,

Pub. L. No. 85-508, §12(p), 72 Stat. 349; 28 United States Code:

§2201.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested parties seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

And Act of June 25, 1948, c. 646, 62 Stat. 964; 28 United States Code:

§2202.

For the necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

And Federal Rules of Civil Procedure:

Rule 57

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. §2201, shall be in accordance with these rules and the right to trial by jury may be demanded under the circumstances and in the manner provided in rules 38 and 39. Existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The Court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

And Nebraska Treatment and Corrections Act §7, as amended by LB57, Session Laws 1973, §1, NEB. REV. STAT. §83-176 (1973 Supp.)

Whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the department.

(2) The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the State Reformatory for Women, or any other facility designed primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the State Reformatory for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities. The determination as to whether the minor is a serious threat to safety shall be made only after juvenile court hearing in the court of original disposition, at which the minor shall have the right to be represented by counsel.

And Nebraska Treatment and Corrections Act §16, as amended by LB499, Session Laws 1972, §1, NEB. REV. STAT. §83-185 (1972 Cum. Supp.):

(1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83-1,107 be forfeited or withheld and also that the person be confined in a disciplinary cell. The chief executive officer may order that such person, during all or part of the period in a disciplinary cell, be put on an adequate and healthful diet. A person in a disciplinary cell shall be visited at least once every eight hours. No cruel, inhuman or corporal punishment shall be used on any person.

(3) The chief executive officer shall maintain a record of breaches of discipline, of the disposition of each case, and of the punishment, if any, for each such breach. Each breach of discipline shall be entered in the person's file, together with the disposition or punishment therefor.

(4) The chief executive officer may recommend to the Director of Corrections that a person who is considered to be incorrigible by reason of frequent intentional breaches of discipline, or who is detrimental to the discipline or the morale of the facility, be transferred to another facility for stricter safekeeping and closer confinement, subject to the provisions of section 83-176.

And Nebraska Treatment and Corrections Act §38, NEB. REV. STAT. §83-1,107 (1971 Reissue):

(1) The chief executive officer of a facility shall reduce for good behavior and faithful performance of duties while confined in a facility the term of a committed offender sentenced as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:

(a) From his minimum term, to determine the date of his eligibility for release on parole; and

(b) From his maximum term, to determine the date when his release under supervision becomes mandatory under the provisions of section 83-1,111.

(2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term shall be forfeited or withheld after an offender is released on parole.

STATEMENT

Robert McDonnell filed this action in the United States District Court for the District of Nebraska in July, 1970, against the chief executive officer, Warden Maurice Sigler, and other prison officers of the Nebraska Penal

and Correctional Complex on behalf of himself and other inmates in the Complex.*

The action challenged several of the practices, rules and regulations of the Complex, however, many such challenges were settled by stipulation of the parties prior to trial with appropriate order at trial.

In trial attention was focused basically upon three general areas: (1) disciplinary hearings at the Complex; (2) inmate legal assistance; and (3) inmate mail, with specific emphasis on attorney-inmate correspondence. Whether or not reprisals were practiced against prisoners exercising the rights to petition the Courts for redress of grievance was also tried.

The trial court granted relief to the inmate class on several of the complaints, particularly with regard to substantive due process, handling of inmate-attorney mail, rules affecting the use of the legal library at the Complex, and on several ancillary matters. The District

---

*In Nebraska all persons sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services, or to the custody of the Warden or Superintendent of any such facility, is deemed to be sentenced or committed to the department. The Complex is one of a number of institutions in the department which is itself under the control of the Director of Correctional Services. The department has "oversight and general control" of all penal institutions. Nebraska Treatment and Corrections Act §7, as amended by LB57 §1, Session Laws 1973, §83-176 NEB. REV. STAT. (1973 Supp.).

The practices, rules and regulations of the Complex attacked in this proceeding all are in force only at that institution and are drafted by the Warden of that facility and not by the Director of the department. *See, Board of Regents v. New Left Education Project,* 404 U.S. 541, 542-43 (1972), *cf., Sands v. Wainwright, etc.* No. 73-1192 (5th Cir. Dec. 26, 1973) *pet. for cert. filed, Guajardo v. Estelle* and *Guajardo v. McAdams,* Misc. No. 73-6465,

Court, at that time bound by *Morrissey v. Brewer*, 443 F.2d 942 (8th Cir. 1971), indicated that it could not follow its inclination to follow the lead of cases such as *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), in requiring that minimum due process be afforded prisoners in disciplinary hearings.

The State of Nebraska appealed, and plaintiff McDonnell cross-appealed to the Eighth Circuit Court of Appeals which granted further relief by reversing such portions of the District Court's order as did not require that the Complex afford minimum due process to inmates when brought before the Complex Adjustment Committee for disciplinary reasons. The Court of Appeals remanded the case to the District Court of Nebraska for further hearings on the due process and legal assistance questions. Particularly, with regard to due process at disciplinary hearings, the District Court directed that further attention be paid to when "fundamental fairness" might require counsel at hearings under this Court's teachings in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The Court also found that while it could not *restore* good time until such time as state remedies had been exhausted, it could and did order that the existing procedures utilized by the Complex in disciplinary hearings did not provide minimum due process to prisoners accused of violating prison rules of conduct for which *substantial penalties* could be imposed if guilty. The Court of Appeals also indicated what requirements seemed to provide minimum due process:

> (a) notice of the charges in time to prepare defense;
>
> (b) an opportunity to summon, confront or cross-examine witnesses;
>
> (c) legal assistance in the preparation of a defense; or

(d) a written statement by the fact finders as to the evidence relied on and reasons for the action taken.

On re-hearing the Court of Appeals expressly denied that its order required "the State to provide or permit legal counsel to every state prisoner involved in a prison disciplinary hearing which may result in a serious penalty. Rather, we follow *John R. Gagnon, Warden v. Gerald H. Scarpelli*, No. 71-1225 (41 LB 4647, May 14, 1973), in holding that counsel was required only in those cases where fundamental fairness cannot be achieved absent counsel." *McDonnell v. Wolff*, 483 F.2d 1059, 1067 (8th Cir. 1973).

The Court of Appeals affirmed the District Court's order relating to mailing regulations.

The Court of Appeals also found that the inmate legal assistance program at the Complex did not pass constitutional muster under *Johnson v. Avery*, 393 U.S. 483 (1969), and remanded the case to the District Court for further hearings to develop what the exact *need* for the legal assistance was, and whether such need was being met. The District Court was ordered to consider civil rights actions in determining the needs of the prison inmates for legal assistance.

SUMMARY OF ARGUMENT

The loss of good time, conferred by statute for "good behavior and faithful performance of duties," and the conditions of a prisoner's incarceration (as opposed to the mere fact of his incarceration) are both matters in which society and the incarcerated offender have a great and substantial interest. For the penal administration to require forfeiture of accumulated good time sentence

credit, to prevent the accumulation of additional good time credit, or alter the status of a prisoner's confinement (to such of an appreciably more severe nature) are, all, to cause a person to suffer "grievous loss." This Court's teachings are that this action can only be accomplished by first affording the person affected the protection of minimum due process.

To afford a prisoner minimum due process in the above situations requires that a prison's designated authority for imposing discipline adopt meaningful hearing procedures which, when they comport with minimum due process standards, are geared to produce reliable and trustworthy findings of fact upon which "informed" correctional expertise may act. A meaningful hearing in a prison environment must include the following factors and attributes:

(1) Notice

(a) specific and sufficiently detailed description of the conduct complained of by the penal authorities to allow understanding of the charge;

(b) time and place such charge will be heard;

(c) a reasonable opportunity to prepare;

(2) Confrontation and Cross-Examination

(a) appropriate for the circumstances and nature of the charge and for legitimate security interests as established;

(3) Presentation of Testimony

(a) appropriate opportunity to call witnesses or present documentary evidence in one's own behalf;

(4) Assistance

Assistance in preparation and presentation of facts or defense as available from prison resources (staff members, other inmates, other personnel) or, if fundamental fairness demands, by a lawyer;

(5) Reliable Findings

Written findings of fact based upon the evidence adduced at the hearing.

When, in those rare instances. fundamental fairness requires counsel, it must and should be furnished by the State to the accused offender within the prison. It is indeed difficult without the benefit of the further findings of fact, as required by the Court of Appeals on remand, to postulate instances in which counsel may be necessary, however, some suggestions are respectfully made as stimulii for further thought, and as indications of the course which probably would be charted by the plaintiffs in the District Court.

The *purpose* served by giving full application of the Court of Appeals relief (on the expungement of prisoner's records) to the plaintiff inmate-class is of overriding benefit to both society and the prisoner. It should, however, be noted that as of yet no order of expungement has been entered for any prisoner in the Nebraska Complex. Again, further fact-finding is necessary in the District Court. Assuming, however, *arguendo*, that expungement should be found to be the proper remedy for individual members of the plaintiff class, the effect of such will not be to allow any prisoner accelerated discharge, parole, or conditional release, unless and until, further action is initiated by the individual to have unlawfully forfeited good time credit restored to him. This has always been the posture of this action, which seeks declaratory and injunctive relief against the prison administration at the Complex.

An inmate's legal mail is, as all parties concede, a valued interest which cannot be abridged, or otherwise restricted, except in the face of substantial and overriding State interest. Convenience or simplicity are not sub-

stantial enough State interests, especially when close examination reveals that the arguments of inconvenience and complexity are, in fact, illusory. Lastly, a person is protected by the Due Process Clause in his efforts to petition Courts for redress of grievance. The Court has set the standards touching the exercise of this right by prisoners long ago, and it is too late to argue that the full range of a prisoner's grievances are not adequately and effectively protected by the First Amendment.

ARGUMENT

I.

PERSONS MUST BE GIVEN A MEANINGFUL HEARING WHICH COMPORTS WITH MINIMAL DUE PROCESS STANDARDS WHEN ACCUSED OF VIOLATING PRISON RULES OF CONDUCT, THE PENALTY FOR WHICH CONDEMNES THE PERSON TO SUFFER GRIEVOUS LOSS.

A. Interest Involved

The threshold question for determining when procedural due process is required is whether an individual will be "condemned to suffer grievous loss" by state actions which do not further compelling state interests. If such a loss is present, then the Due Process Clause of the Fourteenth Amendment intervenes to protect the individual. *Goldberg v. Kelly*, 397 U.S. 254 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1973); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

The continual evolution of due process is, of course, not new to our society. *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 168.

This Court is not alone in recognizing that the right to be heard before being condemned to suffer

grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Under these principles consideration of "not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment" is also required. *Morrissey v. Brewer*, 408 U.S. at 481.

B. Nature Of The Interest

When a prisoner is charged with violating a prison rule of conduct in Nebraska the charge is investigated (A. 29-31) and if "unresolved" during investigation, is brought before the Adjustment Committee. (A. 31-32) According to the Warden "a small number, though, a very small percentage" (A. 32) actually come before the Adjustment Committee of the prison. The Committee is charged by the Warden with reviewing reports of misconduct, conducting hearings into such reports, making findings and imposing disciplinary actions (*See*, R. Vol. I, Stipulation of Fact, Ex. C (Filing 42) for the purposes of and procedures of the Adjustment Committee of the Nebraska prison; as noted at A. 4, the Exhibit is found at Petition for Writ of Certiorari, Appendix-2, at APP. 44-47.)

The thrust of the procedures utilized by the prison as of April 1, 1971, to impose discipline on the inmates evidences not only society's high regard for orderly process,[1] but also penologists' recognition of the need for fairness in dealing with their clients.

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[1] *Joint Anti-Fascist Refugee Committee v. McGrath, supra* at 170:

The defendants have conceded that fundamental due process is required when the prison takes disciplinary action which could result in a serious punishment.[2] This concession reflects nearly universal correctional practice. The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) (hereinafter *Corrections*) recommends that, as a matter of fairness and good sense, hearings be afforded to prisoners charged with serious disciplinary violations. *See, Corrections,* Standard 2.12 at 51-2.

The ABA Resource Center on Correctional Law & Legal Services, *Survey of Prison Disciplinary Practices & Procedures,* at 9-11 (April 1973), (hereinafter ABA Resource Center Survey) Appendix A hereto, notes that fifty-one American jurisdictions afford prisoners disciplinary hearings. There can be little doubt that substantial individual interests are involved.

Those interests include the potential freedom of the inmate through loss of "good time," and the inmate's status within the prison.

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; * * *

[2] *McDonnell v. Wolff, supra* at 1062 (8th Cir. 1973): "In view of the developments in the law, subsequent to trial, the defendants no longer contend that inmates are not entitled to minimum due process in disciplinary hearings which may result in the loss of good time, or the imposition of other substantial penalties. Instead, they argued that existing procedures provide such due process." *See also,* Brief of Evelle J. Younger, Attorney General of the State of California, *Amicus Curiae,* 4 & n. 1.

Contrary to defendant's assertion that good time has been "ruled out of this civil rights case by the court below," Brief for Petitioners at 21, the loss of good time remains a salient and essential factor to be weighed in considering "grievous loss."

The Court of Appeals held that the District Court could not, under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), order *restoration* of good time in a civil rights action. However, the Eighth Circuit correctly noted that *Preiser* does not bar injunctive and declaratory relief for inmates challenging conditions of confinement,[3] nor does it bar consideration of good time deprivations for purposes of determining "grievous loss."[4]

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[3] *See,* McDonnell's Amended Complaint, prayer for relief 2, at 14, and prayer for relief 5, at 15, where declaratory and injunctive relief is sought.

[4] "It follows from *Preiser* that it would be improper for the District Court on remand to restore good time which may have been taken from inmates in proceedings that did not meet the requirements of procedural or substantive due process. A federal court can restore good time only if state remedies have been exhausted.

* * *

To summarize, the District Court must, on remand, determine what procedures are necessary to meet minimum procedural due process standards and whether they are being met. If the defendant is not meeting these standards, the court may grant such declaratory and injunctive relief as it deems necessary, except that it may not restore good time.

483 F.2d at 1064.

The Court of Appeals did not express an opinion as to the adequacy of Nebraska remedies in view of the *Preiser* decision, but instead left that issue to be determined by the District Court on remand. *McDonnel v. Wolff, supra* at 1064.

By holding, in *Preiser*, that loss of good time materially affects the length of a prisoner's sentence, this Court has itself recognized the substantial interests an inmate has in not losing such time in an arbitrary manner. The prisoner's ability to accumulate additional good time sentence credit is in part statutorily controlled and is directly related, in Nebraska, to the prisoner's "good behavior and faithful performance of duties while confined in a facility." Nebraska Treatment and Corrections Act §38, NEB. REV. STAT. §83-1, 107 (Reissue 1971).[5]

> The time when an inmate may enjoy liberty is directly affected by the disallowance of statutory good time. In Green's case, for example, the discipline administered by the prison authorities will postpone the time of release for at least 21 months. Cancellation of such credits inflicts the same kind of "grievous loss" on the prisoner as does the revocation of parole. *United States ex rel. Miller v. Twomey*, 479 F.2d 801, 815 815 (7th Cir. 1973). (Footnotes omitted).[6]

An inmate's status within the prison is equally important. It does not minimize the difference between being a "free person" and a "confined offender" to point out that no person enjoys absolute liberty. Society has

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[5] *See, McDonnell v. Wolff*, 342 F. Supp. 616, 640 & Appendix M (D. Neb. 1972), also set forth in Pet. for Cert., Appendix-2, at App. 39.

[6] The District Court found that Nebraska inmates lost substantial good time: Inmate Jackson lost 70 days; Inmate Owen, 95 days; Inmate Rogers, 45 days; and Inmate Montgomery had "to wait an additional six months for parole," 342 F. Supp. 616, 626-7.

learned to live with constraint or regimentation in one form or another, be it from employment requirements, family responsibilities, societal mores or expectations of the law. Although a prisoner is without freedom of movement, he may enjoy all the "liberty" which his prison performance record permits or which the necessary rules of governing a confined body of person allows.[7]

The prisoner, as a member of the prison population, is "free to" move within that population and, assuming positive response to treatment, will progress toward rehabilitation, in most cases eventual release, (conditional or otherwise) and, hopefully, reintegration into society at large. The prisoner's role as a member of the general prison population parallels his ex-role as a member of general society.

As *Morrissey v. Brewer*, 408 U.S. 471 (1972) recognizes, a parolee has a valuable property interest in achieving and maintaining even his conditional liberty in society, even though he may be subjected to many restrictions not applicable to other citizens. "Liberty", then, is not an absolute, nor limited solely to freedom of movement, but rather is a thing composed of several component parts, the sum total of any number of which (or the very nature of any particular type of which) is valuable to the holder and, as such, is within the "liberty

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[7]Indeed, Mr. Justice Blackman, while sitting on the United States Court of Appeals for the Eighth Circuit, wrote:

> On the other hand, a prisoner of the state does not lose all of his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the prison doors. *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1958) (Citations omitted).

or property" language of the Fourteenth Amendment.[8] And, just as in society, there are restrictions and punishments, other than the fact of incarceration, which can seriously and adversely affect a prisoner's status in the prison, the nature of his confinement, and his access to prison programs.

1. *Solitary Confinement*

When appearing before a disciplinary hearing the prisoner may have at stake being placed in additional or more severe confinement than that to which he has been sentenced by being delivered to the Nebraska Department of Correctional Services.[9]

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[8] That "liberty" is not so narrow a concept as the defendants urge has been made pellucid by this Court numerous times. Thus, loss of one's ability to purchase liquor, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), or of one's driver's license, *Bell v. Burson*, 402 U.S. 535 (1972), have been held sufficient to justify procedural due process. The Seventh Circuit said, in *United States ex rel. Miller v. Twomey*, *supra* at 712:

> In view of the fact that physical confinement is merely one species of legal custody, we are persuaded that *Morrissey* actually pretends a more basic conceptual holding: liberty protected by the due process clause may—indeed must to some extent—coexist within legal custody pursuant to conviction. The deprivation of liberty following the adjudication of guilt is partial, not total. A residuum of constitutionally protected rights remains. (Citations omitted).

[9] *See*, Nebraska Treatment and Corrections Act §7, as amended by LB57, Session Laws 1973, §1, NEB. REV. STAT. §83-176 (1973 Supp.) and Nebraska Treatment and Corrections Act §16, as amended by LB499, Session Laws 1972, §1, NEB. REV. STAT. §83-185 (1972 Cum. Supp.), as set forth at 342 F. Supp. at 639 & Appendix L.

An inmate may be sent to solitary confinement for as long "as necessary." 342 F. Supp. at 648. (Nebraska calls such a confinement "segregation" in the "Adjustment Center.") Here every aspect of the prisoner's life within the prison is altered.

The prisoner is placed on a restricted diet when placed in the Adjustment Center; by definition the prisoner receives no visitors, sees no other prisoners or other persons, participates in no prison programs and has restrictions placed on the availability of legal assistance and correspondence.[10] A prisoner in segregation is likewise unable to earn good time credits.

This Court, in the last century, recognized that solitary confinement is "an additional punishment of the most important and painful character * * *," *In re Medley*, 134 U.S. 160, 167-70, 171 (1908).

The psychological impact upon the entire rehabilitation process cannot be disregarded: "Maximum prison lockup without an appropriate activity program is detrimental to the inmate's health and his rehabilitation prognosis." Scott and Gendeau, *Psychiatric Limitations on Century Deprivations in a Maximum Security Prison*, 14 CANADIAN PSYCHIATRIC ASSOCIATION JOURNAL, 330-341, (1969).

The Nebraska prison administration recognizes the nature of such confinement: Special reports are prepared on men in solitary, and before such punishment may be imposed the inmate must have violated one or more important prison rules.

Perhaps any one of the incidents of solitary; (a) the substantial curtailment of all activities, (b) the drastic

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[10] *See*, A. 30; 342 F. Supp. at 622, 626-27, 633 and Appendix H, 639 and Appendix L, and 647-48 and Appendix Q.

change in a prisoner's position with regard to the general prison society, or (c) the serious detriments solitary may have upon the mental health and rehabilitation, may not by themselves appear particularly egregious, but certainly when taken together, their total impact demonstrate that a prisoner has a "valuable interest" in not being arbitrarily placed in solitary confinement.

2. *Parole And Classification*

As the Court of Appeals noted, one of the most damaging aspects of being arbitrarily found guilty of misconduct is that the report of such disciplinary actions becomes a part of a prisoner's permanent record.[11]

Penology experts give this factor considerable weight:

> The deterrent values of punitive segregation lie not only in amount of time served, . . . but also in the influence upon the actions of the paroling authorities . . . such disposition . . . may effect an inmate's calendar status or may result in revoking of a parole hearing date.

American Correctional Association; *Manual of Correctional Standards*, 413 (3rd Ed. 1966).

As this Court recognized in *Morrissey v. Brewer, supra* at 482: "The parolee has been released from prison based

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[11] " * * * [It] may follow him throughout the prison system; if his punishment was without cause, he is punished anew each time his record is used against him. * * * Similarly, his disciplinary record may affect his eligibility for parole. * * * *Hudson v. Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970) (Citations and footnotes omitted).

See, McDonnell v. Wolff, supra at 1064 & n. 7.

on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person." This "reasonable evaluation" has been made from reviewing the record which the prisoner has compiled while in the custody of the prison. If such great weight is to be accorded these findings, the inmates have substantial interests in assuring their fairness and accuracy.

3. *Confinement To A "Dry Cell"*

A "dry cell" is a cell which, unlike the regular confinement cells, contains no sink or toilet.[12]

A prisoner so confined is without water to wash or to drink, and has no toilet for elimination of bodily wastes.[13] Since the prison regulations require that inmates shower twice a week, and daily showers are encouraged,[14] the prison obviously recognizes the importance of personal hygiene. Such confinement can last indefinitely. There are simply no persuasive arguments that confinement under such conditions for a substantial period of time does not present substantial individual interests.

Additionally, prison inmates have substantial interests in their own treatment and rehabilitation. When treated fairly and punished only after a meaningful opportunity to be heard, their chances for successful rehabilitation

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[12]342 F. Supp. at 626.

[13]Deprivation of such basic requirements of life has been held to constitute cruel and unusual punishment, *Jordon v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

[14]342 F. Supp. at 642.

and return to society may be greatly enhanced. *Morrissey v. Brewer, supra* at 483-84 & n. 12. *See also, Corrections,* Standard 2.12, 51-53.

Therefore, while the defendants have attempted to distinguish the process due a prisoner when his good time credits are to be forfeited—all concede a "grievous loss"—from the process due a prisoner when "other substantial penalties" are imposed upon him; the distinction is meaningless from both a practical and a constitutional standpoint.

C. Governmental Interest

As was clearly stated in *Morrissey v. Brewer, supra,* the State's interest is, to a very large extent, coincident with and identical to that of the prisoners.

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given a breach of parole conditions. * * * Since society has a further interest in treating the parolee with basic fairness, fair treatment and parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

408 U.S. at 483-84 & n. 12.

Of course, the State also has a very legitimate interest in the daily efficient and safe functioning of the prison through control of the prison population. The nature of the prison population is often such that summary treatment may be necessary to control a large group of potentially disruptive prisoners in close custody. *Morrissey v. Brewer, supra* at 483.

The daily administrative functioning of a prison, a legitimate state interest, must allow summary discipline for rule violations [redacted] in penalties of a non-substantial nature. In a prison situation this perhaps involves restrictions of entertainment privileges, commissary privileges, perhaps even, for a brief period of time, more severe confinement, such as to a solitary cell.

Of course, the prison must always retain the right to respond to compelling emergency situations,[15] as well as the power to take summary action against any individual who poses an immediate and present danger to either himself, other prisoners, staff, or society in general.[16]

Given the above factors, it must be recognized that the state has no interest in summarily imposing substantial penalties upon prisoners without procedural guarantees in non-emergency situations. *Morrissey v. Brewer, supra* at 484. As in *Morrissey*, what is needed is "an informal hearing structured to assure that the finding of a * * * [prison conduct] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the * * * [prisoner's] behavior." 408 U.S. at 484. Bearing in mind that both the interest of the State and the prisoner will be furthered by a meaningful hearing, we turn to the nature of the process that is due.

D. The Requisites Of A Meaningful Hearing

As this Court has consistently reiterated: "The right to be heard before property is taken or rights or privileges

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[15] *See, e.g., Inmates of Attica Correctional Institution v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971).

[16] *See, e.g., Landman v. Royster*, 333 F. Supp. 621, 652 (E.D.V.A. 1971).

withdrawn, which have been legally awarded, is of the essence of due process." *Garfield v. Goldsby*, 211 U.S. 249, 262 (1908); *See also, Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This opportunity to be heard "must be 'at a meaningful time and in a meaningful manner,'" *Goldberg v. Kelly, supra* at 267, citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).[17]

The right to be heard in a meaningful manner does not, of course, create static and inflexible procedures which are universally applicable, rather,

> [t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. *Goldberg v. Kelly, supra* at 268-9.

This is simply "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer, supra* at 481.[18]

An individual receives a meaningful and ~~fast~~ fair hearing when reliable information is adduced, and the resulting decision is based upon information actually presented at the hearing. The thrust of this Court's prior decisions has been to provide measures which guarantee both the reliability of the information and the integrity of the decision. In *Goldberg v. Kelly, supra*, the Court held that

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[17] "... a state must afford to all individuals a *meaningful* opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (Emphasis added). *See also, Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

[18] *Morrissey* is itself illustrative of this flexibility. In *Morrissey* it was necessary to have a two-stage procedure, consisting of a preliminary hearing and a parole revocation hearing, 408 U.S. at 485-90, due to the nature of a parole revocation. Clearly a two-step process is not required here, as the incidents, as well as the material witnesses, are all normally conveniently located in the same area.

in order to assure that the information obtained is reliable a hearing should include:

> timely and adequate notice detailing the reasons for a proposed [action] and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. 397 U.S. at 267-8.

These same "minimum requirements of due process" which assure the reliability of information are now embodied in parole revocation procedures, *Morrissey v. Brewer, supra* at 488-9.

Thus, where informal hearings are necessary to assure that the determination being made has a basis in fact, these essentials of due process must be present so that any resulting exercise of discretion is "informed." Yet the District Court below found that Nebraska inmates appearing before the prison's "Adjustment Committee" were punished without prior notice, without an opportunity to confront their accusers or to call witnesses, and without an opportunity to tell their side of the story.[19] This need to assure appropriate safeguards is enhanced in prisons where traditionally broad rules[20]

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[19]342 F. Supp. 616, 626-7. For example, inmate Rice lost good time and spent five days in solitary confinement for refusing an order to work, but he was not able to produce witnesses nor confront his accuser, *Id.*, and it was subsequently revealed that he had, in fact, been in the prison hospital at the time of the offense. *See also*, Appendix C hereto.

[20]The rules of the Nebraska Penal Complex are found at 342 F. Supp. 616, 642-5. In Virginia a federal district court ruled that offenses such as "misbehavior", misconduct", or "agitation" did not sufficiently warn inmates as to what specific conduct was prescribed, *Landman v. Royster, supra* at 654-5. *See generally*, Fox, "Analysis of Prison Disciplinary Problems," in Vedder and Kay, *Penology*, 114 120. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972).

compound the possibility for discriminatory application.[21] The potential infirmities of the vague rules are muted by a hearing scheme which allows an inmate accused of violating a prison conduct rule an opportunity for the full airing of the circumstances of the alleged infraction.

Thus, an inmate facing a major disciplinary violation must be given specific and sufficiently detailed descriptions of the conduct complained of by the authorities to allow him to respond to the charges. This notice must also apprise the person as to the time and place that such charges will be heard, and must afford the individual a reasonable opportunity to prepare. *Cf. Morrissey v. Brewer, supra* at 486-7; *Groppi v. Leslie,* 404 U.S. 496 (1972).[22]

When an inmate has received notice and appears before a disciplinary body, he must be confronted by those with information adverse to him, and be afforded an opportunity to dispute that information, to assure its veracity and reliability, *Morrissey v. Brewer, supra* at 487; *Berger v. California,* 393 U.S. 314 (1969); *Pointer v. Texas,* 380 U.S. 400 (1965).

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[21]The New York State Special Commission on Attica, *Official* Report, 74-5 (1972) concluded that "in the absence of generally understood guidelines, corrections officials had great discretion in interpreting and enforcing the rules." *See,* A.39.

[22]Since in Nebraska under the April, 1971, rules, the corrections officer making the report must already prepare a written statement of the incident for the Adjustment Committee, A. 29, providing the inmate with a copy of that report would certainly not seem onerous. The ABA Resource Center Survey, *supra* at 11 (Appendix A) reports that 48 jurisdictions provide prior written notice to inmates.

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses, *Goldberg v. Kelly, supra* at 269.

The right to confront is so central to fairness that a criminal defendant's right to confrontation overrides society's interest in the confidentiality of juvenile court records, *Davis v. Alaska,* _____ U.S. _____ (1973), 42 U.S. L.W. 4295 (Feb. 26, 1974).[23]

The right to confrontation is, of course, not unlimited, and is subject to restriction where a clear risk of harm to the informant exists, *Cf. Morrissey v. Brewer, supra* at 487, or where the cross-examination goes beyond the scope of the hearing or becomes a "repetitive and unduly harrassing interrogation," *Davis v. Alaska, supra* at 4298.[24]

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[23]This Court has continually adhered to the importance of such confrontation as part of due process to assure accuracy and to prevent faulty memories, perjurers, or "persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy", *Greene v. McElroy,* 360 U.S. 474, 496 (1959). *See also,* Chambers v. Mississippi, 410 U.S. 284 (1973).

[24]The ABA Resource Center Survey, *supra* (Appendix A) puts to rest the myth that confrontation is particularly devastating in a correctional institution because it somehow diminishes authority. It appears that thirty-one jurisdictions presently allow confrontation in disciplinary hearings. *See generally,* Supplemental Brief and Appendix for Respondent, *Avant v. Clifford,* No. 22-73 (N.J. filed Feb. 8, 1974), at 37-45, Appendix B hereto. The nature and scope of the confrontation allowed varies from permitting inmates to cross-examine in every case, only in cases of "major" rule violations, or only in the discretion of the hearing officers. Other methods allow inmates' lay representatives, who may cross-examine. In some, inmates are allowed to submit written questions to be asked by the hearing officers. While Respondents certainly do not intend to endorse the more restrictive of these techniques as being sufficient to satisfy the requisites of a meaningful hearing, the point remains that the use of confrontation has not, in practice, resulted in deterioration of authorities' control of the institution. *See also,* Appendix A at 19.

The prisoner must also have the opportunity to present witnesses and information that would corroborate his own testimony, establish an alibi, and generally overcome the inherent suspicions concerning the veracity of an incarcerated person.[25] *Cf. Morrissey v. Brewer, supra* at 487-8.

Finally, the right to be heard in a meaningful manner at a prison disciplinary hearing, when "tailored to the capacities and circumstances of those who are to be heard", *Goldberg v. Kelly, supra* at 268-9, should include the opportunity to be assisted by a member of the prison staff, by a fellow inmate, or, in appropriate circumstances, by a lawyer.[26] Prison populations include a high number of uneducated, unsophisticated persons who may need such help to effectively and efficiently present evidence and assure reliable information, *Cf. Johnson v. Avery*, 393 U.S. 483, (1969), *Landman v. Royster, supra* at 654. The accused is also personally involved in the incident and perhaps unable to organize and marshall facts, or to argue in mitigation. Further, a prisoner accused of an offense may be unable to talk to potential witnesses or to gather documents in another wing of the institution. Staff personnel are assisting inmates in Maryland, *see, Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971), and Rhode Island, *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970).[27] This scheme may also allow

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[25]The ABA Resource Center Survey, *supra* at 11 (Appendix A) demonstrates that in twenty-five jurisdictions, inmates are permitted to present witnesses in their own behalf.

[26]Appropriate circumstances for representation by legal counsel will be discussed in Part II, *infra.*

[27]The ABA Resource Center Survey, *supra* at 11 (Appendix A) discloses that thirty-nine prison systems allow lay representation. Fourteen also allow representation by legal counsel.

the staff to perform cross-examinations, rather than the inmates themselves, alleviating authorities' fears of "elevating" inmates. This "law" representative can also assist in numerous ways in making the hearing process more administratively efficient as well as fairer.[28]

Notice, confrontation and presentation of witnesses, and lay assistance all go to insuring that the information before the factfinder is as reliable as possible. Due process also requires that this information be fully and fairly considered by the factfinder, *Goldberg v. Kelly, supra.*

While due process certainly does not dictate *who* the hearing officer must be, nor *how many* hearing officers must be present, it is clear that the factfinder cannot be someone who is involved in the incident as a witness, or as reporting officer or factual investigator, *Goldberg v. Kelly, supra* at 271, *Morrissey v. Brewer, supra* at 485-6. Such a requirement in no way impugns the motives of correctional officers; rather it realistically takes into account human nature and assures that the hearing is indeed "meaningful."

At the conclusion of the hearing, the factfinder should prepare "a written statement . . . as to the evidence relied on and the reasons for [the disciplinary action]", *Morrissey v. Brewer, supra* at 489. This memorandum will assure that the factfinder did not go outside the evidence presented at the hearing, although it clearly need not be a formalized opinion, *Cf., Goldberg v. Kelly, supra* at 271;

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[28]While respondent has not measured the same, it would seem that the prison staff personnel involved in the type of meaningful hearing described herein would gain the same advantages in having "their version" heard and tested as would the inmate. *See, Joint Anti-Fascist Refugee Committee v. McGrath, supra* at 172 & n. 19.

Landman v. Royster, supra at 653.[29] This written record will also serve as the basis for any appeal or review of the discipline imposed by the reviewing authority. Such a record may prevent adverse disciplinary determinations which are unsupported by the evidence adduced, *Cf., Arciniega v. Freeman,* 404 U.S. 4 (1971); *Thompson v. Louisville,* 362 U.S. 199 (1960).[30]

Nebraska admits that disciplinary hearings, because they promote a sense of fairness and increase the reliability of adjudications, are sound correctional policy. (Brief of the Petitioners at 21). Each of the model acts and policies quoted in the State's brief encourage the use of fair procedures in disciplinary hearings.

The most recent, comprehensive study of corrections, the Department of Justice sponsored *Corrections* (1973) recommends that prisoners charged with major rule violations be allowed prior notice of charges, lay counsel, an impartial tribunal, an opportunity to present and to confront witnesses, and a written decision subject to higher administrative review. *Id.*, Standard 2.12 at 51-2.[31]

The willingness of the various professional corrections groups to adopt these policies belies any argument that

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[29]According to the ABA Resource Center Survey, *supra* at 11 (Appendix A) thirty-eight jurisdictions render a written decision.

[30]Forty-four prison systems provide for such an appeal, although only twenty-seven specifically inform the inmate of his right to appeal, ABA Resource Center Survey, *supra* at 11 (Appendix A).

[31]The Commission's "Commentary" to Standard 2.12 notes:

> Correctional systems on their own initiative have implemented detailed disciplinary procedures incorporating substantial portions of the recognized elements of administrative agency due process. *Corrections* at 52.

hearings are overly burdensome to administrative convenience and economy, or that some elusive prison "code" makes inmates unreceptive to fair treatment. Moreover, there is absolutely no evidence in this record from which one can conclude that procedures impinge upon institutional control.[32]

To the contrary, there is an admission that the vast majority of the disciplinary reports in Nebraska result in admissions of guilt, obviating the need for most fact-finding hearings, (A.31).

Requiring procedural due process inside prison walls does not restrict the proper exercise of discretion by experienced correctional personnel. Rather, it helps to prevent the flagrant abuses historically perpetrated in the guise of expertise and that, after all, is the purpose of due process.[33]

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[32]No evidence on this point was presented to the trial court by either party, probably because the District Court felt constrained to follow the Eighth Circuit's decision in *Morrissey v. Brewer*, 443 F.2d 942 (8th Cir. 1971) that no due process at all was required, and thus it did not reach the question. In its reversal, the Eighth Circuit specifically ordered the District Court to "establish minimum procedural due process requirements" 483 F.2d at 1064, at remand hearings, where both parties would be able to present evidence.

[33]"It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that makes much of the difference between rule of law and rule by fiat." *Wisconsin v. Constantineau*, 408 U.S. 433, 436 (1971).

II.

THE COURT OF APPEALS PROPERLY DETERMINED THAT, IN ORDER TO ASSURE FUNDAMENTAL FAIRNESS, COUNSEL MAY BE NECESSARY IN A LIMITED NUMBER OF DISCIPLINARY HEARINGS.

In reversing the District Court's decision that procedural due process was not required in prison disciplinary hearings, the Eighth Circuit ordered the District Court to generally follow "the procedural requirements outlined . . . in *Morrissey*, and as supplemented by *Gagnon v. Scarpelli*, 411 U.S. 788 . . . " 483 F.2d at 1059. The Court of Appeals added that:

> specific requirements, including the circumstances in which counsel *may* be required, should be laid down by the District Court after further hearings. 483 F.2d. at 1063 (Emphasis added).

Although the District Court has never acted upon this remand, and there is no single instance in which counsel has been required, Nebraska now argues that counsel should never be required in any disciplinary hearing.[34] The State argues that "untold thousands of civil rights cases" would inevitably result, that disciplinary pro-

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[34]The Eighth Circuit rejected this argument in its denial of the State's Petition for Rehearing:

> Our opinion . . . does not require the state to provide or permit legal counsel to every state prisoner involved in a prison disciplinary hearing which may result in a serious penalty. Rather, we follow *Gagnon v. Scarpelli* . . . in holding that counsel is required only in those cases where fundamental fairness cannot be achieved absent counsel. 483 F.2d at 1067. (Citations omitted).

ceedings would cease to function, and that the inmates have no substantial interests justifying counsel in such proceedings, Brief of the Petitioners at 42-3.

There is absolutely no factual data in the record to support the State's dismal forecasts. The assertion that fundamental fairness may *never* require counsel overlooks the possibility:

> that the effectiveness of the guaranteed [by due process] may in some circumstances depend on the use of skills which the [prisoner] is unlikely to possess. *Gagnon v. Scarpelli,* 411 U.S. 778, 786.

Disciplinary hearings, like parole revocation hearings, are informal in nature and do not require technical rules of evidence, but there likewise may be situations where a prisoner, faced with a major rule violation,

> may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examing of witnesses or the offering or dissecting of complex documentary evidence. *Id.* at 787.

The Eighth Circuit did not hold, nor has *McDonnell* ever contended, that counsel is required in every disciplinary hearing. Rather, taking into consideration the practical difficulties and the comparatively informal nature of disciplinary hearings, it is urged that the same type of case by case approach recently deemed adequate by this Court in *Gagnon* be applied in these circumstances as well.

> The need for counsel at revocation hearings derives not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases. *Id.* at 790.

The practical impact of applying *Gagnon* to disciplinary hearings would be minimal. There are likely to

be very few instances where evidence is complex and not readily at hand, and if lay representation is provided,[35] the number of cases in which attorneys would be necessary is further reduced. Moreover, the record clearly reflects that only a small percentage of disciplinary charges ever result in any type of hearing at all.[36]

Without benefit of any factual findings by the District Court on this issue, it is particularly difficult for Respondents to suggest precise circumstances in which counsel's presence may be necessary, and indeed this Court, in *Gagnon,* stated that

> It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. 411 U.S. at 790.

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[35]Contrary to Nebraska's prognostications about the results of allowing representation, recent experiences with various types of lay representation (students, staff, other inmates) have not resulted in detrimental side effects, *See, e.g.,* "Providing Legal Services to Prisoners: An Analysis and Report", ABA Commission on Correctional Facilities and Services (May, 1973); Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 KAN. L. REV. 493, 589-613 (1970) (hereinafter referred Jacob and Sharma); *Corrections,* Standard 2.2. There is no reason to believe that use of attorneys in a small number of cases will pose any greater risks to administration than does the use of law students or other inmates.

[36]Warden Wolff testified that inmates "in the most part will admit their guilt in something that they are involved in" and these cases are resolved without a hearing, A.31. He went on to say that "a very small number . . . require additional investigation and there are some cases that only the Adjustment Committee can resolve . . . These are a small number, though, a very small percentage." A.31-2.

However, it is possible to postulate some broad guidelines to aid the factfinder in determining when counsel is necessary. To do so is not to suggest that any one of the criteria in and of itself (except perhaps violation of a criminal statute) is sufficient to require counsel, but merely to highlight the kinds of situations in which the concerns of *Gagnon* may be present.

Also, when a request for appointment of counsel is made and refused "the grounds for refusal should be stated strictly in the record." *Gagnon v. Scarpelli, supra* at 791.

One such guideline is the ability of the particular inmate to defend himself. *Gagnon v. Scarpelli, supra; Cf. Powell v. Alabama,* 287 U.S. 45, 68-9 (1932). Studies reflect that incarcerated persons have not generally attained a high level of educational achievement, and that their "I.Q." results are lower than the general population.[37] Additionally, there is a higher incidence of mental retardation in prison populations.[38] Thus, a particular inmate may have great difficulty in understanding or defending the charges, and may require assistance to assure fairness.

Another possible consideration would be the complexity of the factual determination to be made, *Gagnon v. Scarpelli, supra.* Factors such as the number of witnesses to be called, the extent of the testimony, and the nature of the facts in dispute should be weighed in light of the inmate's capabilities.

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[37]*See,* the studies reported in Jacob and Sharma, *supra* at 508-9; President's Commission on Law Enforcement and Administration of Justice, *Corrections* at 2 (1967).

[38]Jacob and Sharma, *supra* at 508-9.

A third criteria to be considered is the severity of the potential punishments that may be imposed as a result of the hearing, *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 36-7 (1972). Thus, where an inmate faces a potential loss of good time, resulting in increased confinement, there may be a concomitant increase in the need for an attorney's assistance.[39] Likewise, the prospect of extended confinement in isolation is a potentially severe punishment which might justify the need for a lawyer.[40]

The violation of a prison rule may also result in the violation of a criminal statute. In such situations not only does an inmate face potential in-prison punishment, but also the prospect that the information and evidence presented to a disciplinary hearing, including his own testimony, may be the basis of a subsequent criminal charge. It is clear that questioning an incarcerated person suspected of a crime is a custodial interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mathis v. United States*, 391 U.S. 1, 4 (1968). The accused inmate may need assistance in deciding whether to testify or to remain silent before the disciplinary board.[41] Thus, in determining whether the gravity of the

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[39]The District Court found that, for example, inmate Jackson lost 70 days of good time, 342 F. Supp. at 626; Inmate Maxwell "lost all the good time he could possibly earn in the future," *Id.* at 627; Inmate Johnson lost all of his good time, *Id.*, Inmate Rollins lost 38 days incentive good time and 16 *months* of statutory good time. *Id.*

[40]Inmate Rice spent 43 days isolated in the "Adjustment Center" 342 F. Supp. at 627; Inmate Hart "was placed in solitary for a month." *Id.*

[41]*See*, Turner and Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 Buffalo L.Rev. 759 (1972); *Cluchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *People v. Dorado*, 62 Cal. 2d 388, 398 P.2d 361 (1965).

offense is such as to require counsel, great weight should be given the fact that the rule violation is also a crime.[42]

In sum, there are no functional or practical differences between parole revocation hearings and disciplinary hearings for major prison offenses. The Eighth Circuit properly ordered the District Court to determine what circumstances, if any, would require counsel's presence. There are, as has been suggested, sufficient criteria available for guiding such discretion.

The State's dire predictions of institutional chaos are unsupported by the evidence in the record. While counsel is clearly *not* required in *every* informal administrative hearing, it is also clear that "there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent [prisoners]." *Gagnon v. Scarpelli, supra* 411 U.S. at 790.

III.

FULL APPLICATION OF CONSTITUTIONAL STANDARDS IS NECESSARY AND REQUIRED WHEN THEIR PURPOSE IS TO MINIMIZE OR AVOID ARBITRARY OR UNRELIABLE RESULTS.

In this action the plaintiff prays for a declaratory judgment of the rights and legal relations of the parties in

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[42]Some federal courts have attempted to solve this constitutional dilemma by other means. In *Palmigiano v. Baxter*, 487 F.2d 1280, 1289, (1st Cir. 1973), the First Circuit held that the accused should be granted "use" immunity for statements made in a disciplinary hearing when subsequent criminal charges were filed. *See also, Carter v. McGinnis*, 351 F. Supp. 787 (W.D.N.Y. 1972); *Cf. Inmates of Attica v. Rockefeller*, 453 F.2d 12 (2nd Cir. 1971); *Nelson v. Sard*, 402 F.2d 653, 655 (D.C. Cir. 1968).

connection with the matters referred to in his amended complaint. (*See*, R. Vol. I., Amended Complaint, prayer for relief 1, at 14). The defendants assert that the Court of Appeals has broken original ground in applying relief to the plaintiff class "retroactively." (Pet. for Cert. at 17).

Initially it must be understood that it was not ordered or determined by the Court of Appeals that there should be expunged from prison records all determinations of misconduct, rather the Court of Appeals held that it would be:

> appropriate for the District Court to order expunged from prison records, determinations of misconduct [presumably from hearings which could have resulted in serious penalties to a prisoner] which such determinations were arrived at in hearings that failed to comport with minimum due process requirements. 483 F.2d at 1058.

On remand the District Court was ordered to "determine what procedures are necessary to meet minimum procedural due process standards," and determine whether such standards are being met. If "the defendant is not meeting these standards, the Court may grant such declaratory and injunctive relief as it deems necessary, except that it may not restore good time." 483 F.2d at 1058.

Assume, *arguendo*, that the District Court determines that the procedures necessary to meet minimum procedural due process standards have not been met in disciplinary hearings which have resulted in serious penalties and "grievous loss" to prisoners still incarcerated in the prison. Such prisoners should have the underlying determination of misconduct which led to the imposition of serious punishment expunged from their

records to prevent further "grievous loss" from being inflicted upon the prisoner.[43]

Furthermore, the prison has as great an interest as the prisoner in having such a record entry expunged from the prisoner's permanent record. *See, Morrissey v. Brewer, supra* at 495: "Yet, the State has no interest in revoking parole [–imposing serious penalties–] without some informal procedural guarantees."

Therefore, while the plaintiff sought adjudication and declaration of the rights and legal relations of the parties in this action in connection with matters referred to in his amended complaint, and presented at trial, it is not difficult to understand why the Court of Appeals felt that it would be "appropriate" relief to the plaintiff class to order expunged from a prisoner's records determinations of misconduct which were the fruits of hearings of which the "truth-finding function" had been the object of constitutional attack.

As this Court has held:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application of these circumstances.
>
> "It is quite different where the purpose of the new constitutional standards proscribing the use of cer-

[43] *See*, Note 11, *supra*.

tain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends." *Williams v. United States*, 401 U.S. 646, 653 (1971).

It was, of course, the concern of the Eighth Circuit, "to minimize or avoid arbitrary or unreliable results" when it held that expungement of past determinations of misconduct would be appropriate should the District Court find on remand that minimum procedural standards were not followed when inmates were given disciplinary hearings for which substantial penalties could be imposed upon them.

In prison disciplinary hearings there are no other procedural safeguards upon which the validity of the factfinding process can be otherwise anchored. *See, Johnson v. New Jersey*, 384 U.S. 719 (1966). There is also, unfortunately, ample evidence from the federal trial courts and in this record that the factfinding process has in the past not been reliable.[44]

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[44] *Landman v. Royster, supra* at 650; *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *McDonnell v. Wolff*, 342 F. Supp. at 627: "It is evident that the procedure described by Warden Wolff in his testimony is not in practice been followed in all instances"; Testimony of Inmate Rice, A.41. *See also*, California Assembly Select Committee on Prison Reform and Rehabilitation, Alias: The Hole, Lockup, Solitary Confinement and the Adjustment Center (1973), Appendix C hereto:

Recommendation No. 2 – Disciplinary Hearings

Existing procedures to safeguard the prisioners' rights in disciplinary hearings are frequently not followed. In spite of the American Justice System, convicts are often presumed to be guilty, when suspected of new crimes. Therefore, hearings are concerned primarily with punishment rather than determining guilt. The arbitrary, unchecked, and overwhelming power of the Disciplinary and Classification Committees is smothering the right of the prisoner to due process. *Id.* at -6-.

In light of both the prisoner's and the State's overriding and shared interest in not having action taken against a prisoner which is based on anything other than reliably determined facts, the appropriateness of expunging unreliable findings of prisoner misconduct is clear. This Court has recognized in both *Morrissey v. Brewer, supra* and *Gagnon v. Scarpelli, supra,* that both societal and prisoner interests lie in "neither unnecessarily interrupting successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Gagnon v. Scarpelli, supra* at 785.[45]

Notwithstanding assertions to the contrary, giving the full force of law to a decision which determines constitutional rights is not a "novel doctrine" of constitutional law. *Linkletter v. Walker,* 381 U.S. 618, 622-23 (1965):

> At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to "pronounce a new law, but to maintain and expound the old one." 1 Blackstone, Commentaries 69 (15th ed. 1809). This court followed that rule in *Norton v. Shelby County,* 418 U.S. 425 (1886), holding that unconstitutional action "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, inoperative as though it had never been passed." At 422. The judge rather than being the creator of the law was the discoverer. Gray, Nature and Sources of the Law 222 (1st ed. 1909).

Later decisions applying *Linkletter* have amplified this Court's considerations when deciding constitutional

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[45] *See also, Cooper v. Lockhart,* 489 F.2d 308 (8th Cir. 1973).

doctrine in this area. *Stovall v. Denno,* 388 U.S. 293 (1967), employed a three-fold test directed at discovering (1) the *purpose* to be served by the new standards, (2) the extent of the *reliance* by the law enforcement authorities on the old standards, and (3) the *effect* of the administration of justice of a retroactive application of the new standards.

While the petitioners in this action have not attempted to make a *Linkletter-Stovall* showing of the "reliance and effect" considerations versus the "purpose" considerations in applying the relief fashioned by the Court of Appeals, attention focused on this expungement point in the lower courts. *See, Adams v. Carlson,* 488 F.2d 619, 628 (7th Cir. 1973).[46]

The discussion above highlights the overwhelming importance of the *purpose* served by giving the Court of Appeals' direction full application to the plaintiff class. A brief look at the effect of such application is of interest.

[46]"We will, nevertheless, continue on to examine the factors of reliance by and impact upon agencies of law enforcement. On the whole, they bolster, not weaken our conclusion.

The reliance which prison officials have placed on *Pate* and its predecessors cannot be gainsaid, but neither can the fact that their provision of a new hearing to segregate inmates is far less likely to disrupt the administration of justice then were the retrials which would have resulted had *Linkletter* come out the other way or had *Adams,* where not only a new trial but a new indictment and preliminary hearing would have been required. A rehearing under *Miller* is a much less complex and time-consuming matter than a criminal retrial. Moreover, a *Miller* rehearing raises a relatively minor problem of lost or forgetful witnesses since it is fair to say that segregation is typically a shorter affair by far than the term of a criminal sentence." *Adams v. Carlson, supra* at 628 (Footnotes omitted).

As has been explained, the Eighth Circuit held that until such time as it is determined that Nebraska remedies have been exhausted, the plaintiff McDonnell is not entitled to have any forfeited good time returned to him. The amended complaint in this action does seek *restoration* of good time for the plaintiff class representatives, Robert O. McDonnell. It seeks declaratory relief only, however, as to the rights of the other members of the class. Therefore, not only after *Preiser*, even prior to *Preiser*, the balance of the inmate plaintiff class has the burden of individually coming forward to seek relief for restoration for forfeited good time in appropriate actions in either state or federal court. Such individual claims for relief would, undeniably, be based upon the relief obtained for the inmate class on the issue of the constitutional adequateness of the disciplinary hearings which has been given by the defendants before forfeiture of accumulated good time was ordered.

It is obvious that the "retroactive" effect of the Court of Appeals' decision goes only to the expungement of eligible determinations of misconduct from the records of prisoners who remain incarcerated in the prison. No prisoner will have his time for consideration as to parole eligibility accelerated by such expungement without the further determination, in some appropriate proceeding, that needed good time, which may have been unlawfully taken from him, should be restored.

Furthermore, nothing will prevent the prison from giving meaningful hearings to prisoners whose conduct has been such that the prison believes societal interest requires that reliable findings of misconduct be included in the prisoner's file, be it to effect the prisoner's eligibility for discharge, release under parole, or other release under supervision from the prison.

As *Williams* holds "good faith reliance" on prior constitutional law or accepted practices cannot suffice to require only prospective application of the law when the major purpose of "new constitutional doctrine is to overcome" an aspect of a proceeding which "substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, * * * " 401 U.S. at 653.

In the absence of any definitive presentation by the petitioner of any adverse *effect* which giving the full force of law to the Court of Appeals' decision would have on the prison or society, and in view of society's and the inmates' overriding interest in the *purpose* served by giving the members of the plaintiff class the full benefit of the lower court holding, the propriety of *not* applying the relief of the Court of Appeals in a solely "prospective" manner is clear.[47]

IV.

DUE PROCESS ASSURES THAT THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS WILL NOT BE ABRIDGED OR RESTRICTED WITHOUT SUBSTANTIAL AND CONVINCING JUSTIFICATION.

The Court of Appeals affirmed the District Court's holding that due process prohibits the censoring or

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[47] *See, Berry v. Cincinnati,* 414 U.S. 29 (1973), giving all those convicted prior to the decision in *Argersinger v. Hamlin, supra,* the benefit of that constitutional rule. It seems clear that the results of "conviction" before a disciplinary committee have a far more profound effect on the prisoner's life and liberty than do convictions for misdemeanors in our society. *See also, Robinson v. Neil,* 409 U.S. 505 (1972)

opening[48] of an inmate's confidential mail to and from his attorney in order to insure that the plaintiff's First, Sixth and Fourteenth Amendment rights are protected.

The test which the Court of Appeals used in sustaining the District Court's order was:

> Prison authorities must show that the regulation of an inmate's right to send and receive mail furthers a substantial interest, and that the incidential restrictions placed on an inmate's rights are no greater than essential to further that interest. *Cf.*, United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); Nolan v. Fitzpatrick, 451 F.2d 545, 548 (1st Cir. 1971); Note, Prison Mail Censorship and the First Amendment, 81 Yale L.Rev. 87, 94-104 (1971). The District Court's order comports with these principles, and we affirm it in this respect. 483 F.2d at 1067.

In this Court the defendants concede the valuable First and Fourteenth Amendments interests which prisoners have in petitioning their Government for redress of grievances.[49] The plaintiff's Sixth Amendment rights on this issue were largely settled by stipulation and order at trial.

The exercise of the plaintiff's rights involves prisoners in communicating with the judicial branch of government

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[48]342 F. Supp. at 625; 483 F.2d at 1066.

The prison had regularly read and censored all correspondence to and from prisoners to persons outside the prison, including attorneys, but the defendants assert that they have now abandoned that practice. *See* 342 F. Supp. at 622.

[49]Brief of the Petitioners at 46; Petition for Writ of Certiorari at 15.

The defendants have changed their position on this issue dramatically since the trial. A.38.

directly, as well as through their attorneys, who are officers of the judicial branch. It is not contested that effective assistance of counsel is an integral part of the right to petition the Courts for redress of grievances. *McMann v. Richardson*, 397 U.S. 759 (1970).

In order to protect this right, the Court of Appeals held that attorney mail could *not* be opened unless the prison officials demonstrated that there is a "real possibility" that a particular attorney may be sending contraband through the mails and into the prison, and that the available mechanical devices, or other alternatives for detection, would fail to disclose such contraband.[50] In these instances prison officials may open mail. However, if an envelope from an attorney is marked "privileged" or "attorney-client mail," then, and in that event, that mail may not be opened except in the presence of the inmate-addressee for the purpose of intercepting such contraband as may be included in the mail. 342 F. Supp. at 625; 483 F.2d at 1066.

Nebraska, while conceding that it does not have the right to censor or delay mail,[51] argues that it does have

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[50]There are methods to protect the legitimate societal interests described by defendants in preliminary hearings in this proceeding. *See*, 483 F.2d at 1066-67; *Moore v. Ciccone*, 459 F.2d 574 (8th Cir. 1972).

[51]*See*, 342 F. Supp. at 622. This abuse by penal authorities is not peculiar only to the Nebraska prison, and has been described in *Corrections*, Standard 2.17 Access to the Public, 67:

> Mail. In censoring or regulating mail, correctional authorities have not limited themselves to keeping out harmful or potentially dangerous objects or substances. The censorship of mail all too often has been utilized to exclude ideas deemed by the censor to be threatening or harmful to offenders or critical of the correctional agency. These efforts result in the diversion of manpower from other tasks and, to

an obligation to stop contraband, and that the Eighth Circuit's holding unduly impinges upon this obligation.

It argues that all attorneys present a "real possibility" of being potential smugglers of contraband into a prison through the mails, and therefore, all legal mail should be opened in the presence of the inmate-addressee. It further contends that ascertaining the proper identity of attorneys unknown to prison officials cannot be easily accomplished.[52]

These arguments miss the mark. Once the State concedes that the right of the inmate to correspond freely with counsel in furtherance of access to the courts is protected, it must then bear the burden of justifying those situations where it believes that interference with legal mail is necessary. It is incongruous to recognize lawyers as officers of the court, under a professional oath and subject to administrative and penal sanctions for abuse of such oath, and then to assert that lawyers, as a class, are untrustworthy and reliable.

The Court of Appeals has rejected such "all or nothing" treatment, and has provided that officials must

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avoid excessive manpower traits, limitations on the volume of correspondence permitted. Censorship or limitations on correspondence directly generate inmate hostilities and serve to make correctional progress more difficult.

Courts began to look critically at this process when it came to their attention that correctional authorities were limiting access to courts. Instances of failure to mail complaints, invasion of privileged attorney-client communications, and reprisals against inmates for attempting to send out information about deficient conditions were documented. Limitations on access to religious materials were also discovered and criticized.

[52] *See*, A.38.

deal only with those lawyers for whom there are reasonable grounds–a "real possibility"–to suspect unprofessional or illegal conduct.[53]

From an efficiency standpoint, it is clear that *not* opening the majority of attorney mail would greatly reduce the time and effort of staff otherwise consumed by mail processing. It would allow time to pay greater attention to those few cases where reasonable grounds for suspicion do, in fact, exist.

Attorneys who are members of the State bar are readily screened, as are those out-of-state attorneys who are known, for one reason or another, to prison officials. For those out-of-state lawyers unknown to the institution, such procedures as routine form letters addressed to the attorney requesting information about him could be utilized by the prison to gather information; phone calls

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[53] *See also, Adams v. Carlson,* 488 F.2d 619, 631-32 (7th Cir. 1973), where that Court of Appeals, in discussing the arrangement of a prison's visiting room discussed the importance of attorney-client communication, which discussion seems as applicable to mail as the visiting room therein the subject:

> To justify his impairment of communication between attorneys and inmates in the name of security, a prison warden must come forward with facts which tend to support a reasonable suspicion not only that contraband is being smuggled to inmates in the fact of established preventive measures, but that their attorneys are engaged in the smuggling. We ground the last requirement on our unwillingness to assume that attorneys–admittedly the partisan advocates in court of their clients' cause–are more willing or more inclined to smuggle contraband past prison officials than are other outsiders who deal with inmates, as well as on our recognition of the constitutional importance of the business which an attorney typically conducts with an inmate, * * *

could be directed to parties known reliable for information concerning the lawyer, or appropriate bar associations contacted.

Perhaps, where substantial doubts continue to exist, a letter could be delayed until further and more reliable data concerning a lawyer could be gathered, or authorization to inspect the mail from such a lawyer could be obtained from the attorney himself. It must be emphasized that such checks need be done only one time for each "suspect" or, conceivably, only periodically as the need arises. There would be no need for a continuous, ongoing process of investigation for every lawyer desiring to contact his client in the prison. Since the bulk of all lawyers will undoubtedly be locally known or investigable, checks upon these persons, if deemed necessary, are *not* unreasonably burdensome when weighed against the protected interest of the prisoner.

What the constitution requires is clear and has been conceded. What remains is for the defendants to implement mailing regulations pursuant to the constitutional standards required and conceded. To argue to this Court for "permission" to utilize a "simpler" method does not seem proper. *Morrissey v. Brewer, supra* at 488:

> We cannot write a code of procedure; that is the responsibility of each State. Most states have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. (Footnotes omitted).

As the defendants assert no substantial interest to this Court other than "convenience" for reversing the Eighth Circuit Court of Appeals, it is difficult to conclude that anything other than affirmance of the Court of Appeals on this issue is necessary.

V.

DUE PROCESS ASSURES ACCESS TO THE COURTS FOR REDRESS OF CONSTITUTIONAL VIOLATIONS REGARDLESS OF THE FORM OF ACTION.

In *Johnson v. Avery*, 393 U.S. 483 (1969), this Court said:

> It is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed. 393 U.S. at 485.

The Court went on to hold that so long as a state did not provide reasonable alternative means of legal assistance to indigent inmates, a prohibition against inmates assisting one another on legal matters was unconstitutional, 393 U.S. at 490.

The Eighth Circuit, in applying *Johnson v. Avery* to the instant situation, held:

> The burden is on the defendants to demonstrate that they are providing a reasonable alternative . . . In meeting this burden, the defendants must produce evidence establishing in specific terms *what the need is for legal assistance* . . . Furthermore, in determining the need for legal assistance, the defendants must take into account the need for assistance in civil rights actions as well as habeas corpus suits. 483 F.2d at 1065 (Citations omitted) (Emphasis is original).

Nebraska contends that the Eighth Circuit erred in requiring that civil rights actions be included in determining the need for legal assistance.[54] The State argues

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[54]It must be emphasized that the Eighth Circuit's description of "civil rights actions" is not limited to *federal* remedies, *e.g.*, 42 U.S.C. §1983, anymore than *Johnson v. Avery* was limited solely to federal *habeas corpus*.

that the right of access to the courts is limited solely to *habeas corpus* petitions.

This interpretation is too restrictive. As this Court said in *Boddie v. Connecticut, supra* at 374-5:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members . . .
>
> Without this guarantee that one cannot be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable . . .

Ex Parte Hull, 312 U.S. 546 (1941), established that "the state and its officers may not abridge or impair petitioner's rights to apply to a federal court for a writ of habeas corpus," *Id.* at 549.[55] *Johnson v. Avery, supra* reiterated that:

> It is fundamental that access of prisoners to the courts for the purpose of presenting their *complaints* may not be denied or obstructed. 393 U.S. at 485 (Emphasis added).

Common to *habeas corpus* petitions and civil rights complaints is the fact that both are directed at redressing violations of constitutional rights which arise directly from the fact or nature of the prisoner's confinement.[56]

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[55]Although the Court specifically referred to *habeas corpus* petitions because that was the nature of the writ filed in *Hull*, the regulation in question required prior approval of "all legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals," 312 U.S. at 548. The Court simply concluded "The regulation is invalid," 312 U.S. at 549.

[56]It is instructive to note that even the specific prison regulation challenged herein does not draw a distinction between *habeas corpus* petitions, civil rights cases, or other forms of actions. It

Indeed, this Court has already recognized instances where the same constitutional rights might be redressed under either form of relief, *Cf. Preiser v. Rodriguez, supra; Wilwording v. Swenson,* 404 U.S. 249 (1971). While the origins of *habeas corpus* may be, as Nebraska argues, more firmly rooted in Anglo-Saxon tradition, the comparatively recent origins of a statute similarly designed to protect basic rights is clearly an insufficient distinction to justify different treatment for the two forms of action.

In affirming a decision which required state officials to provide indigent inmates with access to a reasonable law library for preparation of legal actions, this Court made no distinctions between civil rights cases and *habeas corpus* petitions, *Younger v. Gilmore,* 404 U.S. 15 (1971), nor did the three judge court whose judgment was upheld:

> "Access to the courts," then, is a larger concept than that put forward by the state. It encompasses all the means a defendant or petitioner might require to get a fair hearing on all charges brought against him or *grievances alleged by him* . . . some provision must be made to ensure that prisoners have the assistance necessary to file petitions and *complaints* which will in fact be fully considered by the courts. *Gilmore v. Lynch,* 319 F. Supp. 105, 110 (N.C. Cal. 1970) (Emphasis added).

See also, Cruz v. Hauck, 404 U.S. 59 (1971).

Moreover, the underlying policy considerations discussed in *Johnson v. Avery* are exactly the same for *habeas corpus* petitioners and civil rights complainants. A high percentage of prisoners filing either type of claim are

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simply refers to a "legal advisor" who has been appointed for the benefit of those in need of "legal assistance." 483 F.2d at 1065.

"totally or functionally illiterate", have "slight" educational attainments, or "limited" intelligence, and thus are in greater need of assistance in protecting their constitutional rights, *Johnson v. Avery, supra* at 487. *See also,* Jacob and Sharma at 508. The State's interest in "controlling" the prison writ writer is the same regardless of the type of action filed, and the same type of "reasonable restrictions" authorized in *Johnson v. Avery* with respect to compensation, time, and location of writ writers' activities, are available, 393 U.S. at 490. Additionally, since *Johnson,* burgeoning numbers of prison legal assistance programs continue to demonstrate that reasonable alternatives can, and do, exist. *See generally,* "Providing Legal Services to Prisoners: An Analysis and Report," American Bar Association Commission on Correctional Facilities and Services, (May, 1973).[57]

Legal assistance programs have been recognized to be of such value that the National Advisory Commission on Criminal Justice Standards and Goals has recommended that free *legal* counsel be accorded indigent inmates in *all* matters relating to their care, custody, and confinement, *Corrections,* Standards 2.2 at 26.

Finally, the Eighth Circuit's conclusion with regard to including civil rights suits in an inmate legal assistance

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[57] This "Report" also contains recent data responsive to Nebraska's assertion that increased legal assistance will necessarily lead to increased federal caseloads. It estimates that only 3% of prisoners' problems are "Prisoners' Rights Cases," *Id.* at 10. And to the contrary, the report discloses that increased legal assistance can result in a *decrease* of docketed cases by screening out frivolous cases and by encouring administrative redress. Moreover, those cases which are filed may be more artfully prepared and researched, thus cutting down the time and energy expended by the judiciary. *Id.* at 10-14.

plan is unanimously shared by the other federal courts which have specifically considered the question. *Andrade v. Hauck*, 452 F.2d 1071 (5th Cir. 1971); *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *Cross v. Powers*, 328 F. Supp. 899 (W.D. Wis. 1971). The Eighth Circuit has also reaffirmed its position in this regard, *Noorlander v. Ciccone*, 489 F.2d 642, 650 (8th Cir. 1973).

The right of access to the courts is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental rights. Whether a prisoner, without formal training in the law, styles his claim as a petition for *habeas corpus* or as a civil rights action, the essence of the complaint is that constitutional rights have been violated. Correctional authorities bear a heavy burden of justification for prison rules which restrict such actions. The Eighth Circuit's remand to the District Court for proof of such justification is proper.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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April 6, 1974

APPENDIX A

SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES

Prepared by

RESOURCE CENTER ON CORRECTIONAL

LAW AND LEGAL SERVICES

American Bar Association

Commission on Correctional Facilities and Services

Washington, D.C. March 1974

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SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES

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PREFACE

When the "hands-off" barrier to judicial review of prison matters fell, the first problems dealt with by the courts were specific rights and specific practices. As the judiciary has gained knowledge and experience in working with correctional issues, its attention has been directed to the more complicated areas of correctional administration. Most recently, the Supreme Court has begun to review a variety of correctional issues.

These developments have evoked an unprecedented response. The number and variety of individual scholars and organizations that have looked closely at correctional problems and contributed valuable surveys and analyses toward their solution is impressive indeed. A succession of national commissions have dealt with these same problems at increasingly fine levels of detail.

This report is addressed to one area - the prison disciplinary process - which has heretofore escaped factual examination. We have tried to develop a picture of individual state and national practices which can serve as a back-drop for the present judicial consideration of what due process requires in the way of disciplinary procedures.

Many individual prison officials and assistant state attorneys general provided the information on which this survey is based. Their assistance is gratefully acknowledged. Two New Jersey officials deserve special thanks - Joseph T. Maloney and Joseph DeMarco. Deputy Attorney General Maloney collected and analyzed considerable material from 43 states regarding confrontation and cross-examination, thus easing our task. Mr. DeMarco, deputy clerk of the New Jersey Supreme Court, greatly facilitated our examination of the Maloney materials, which had been filed with the Court. Mr. Justice Mathew O. Tobriner of the California Supreme Court and his former law clerk, Robert C. Vanderet, now a California practitioner, are also due special mention and thanks for making available a collection of data regarding prison disciplinary practices in 1972. This gave us a basis for judging the direction of change in this field.

Paul F. Attaguile and Ralph H. Loewenstein, Resource Center staff members, and Ellen Geis, a law student working with us under an externship program, collected, organized, and evaluated our data. This report is largely their accomplishment.

Melvin T. Axilbund
Project Director

I. INTRODUCTION

This examination of prison disciplinary practices is the most recent in a series of national surveys and monographs produced by the Resource Center on Correctional Law and Legal Services. Earlier investigations of similar scope have looked at such diverse topics as the implementation of Morrissey v. Brewer, 408 U.S. 471 (1972), by state parole boards, alternative programs for providing legal services to prisoners, state practices regarding sentence computation, and the number and type of conditions typically imposed on parolees.

The interests and mandate of the Resource Center are broader than these individual reports. The Resource Center was created in 1972 by the American Bar Association's Commission on Correctional Facilities and Services to keep track of, and advance, legal issues in correctional reform. Expansion of legal services for prisoners -- including manpower resources to deliver them -- and prison grievance mechanisms were other prime concerns described in the Resource Center's charter. The Ford Foundation and the Office of Economic Opportunity jointly fund the Resource Center.

The immense and pervasive impact of prison discipline on the daily lives of those confined in penal institutions has been a major concern of the Resource Center since its inception. The issue could hardly have been avoided. For at least three years the advance sheets have contained a steady stream of judicial decisions from many levels, each seeking to strike a proper balance between institutional needs and the interest in fairness of those who are being disciplined. The need for fair procedures is no longer questioned in the cases. What procedures are fair, and what circumstances trigger their application are the dominant issues. Mail to the Resource Center from prisoners, their lawyers and families, and also from correctional administrators has sought guidance on the meaning and application of these decisions.

A number of the Resource Center's earlier endeavors contributed to our understanding of the disciplinary process, and hopefully to that of others as well. As a briefing device for staff and a working document for our constituency, a monograph on discipline was developed shortly after the Resource Center was established. Entitled "Due Process in Disciplinary Hearings," the paper identified and analyzed the case law to 1972. Valuable experience in working with these precedents was gained in Louisiana. There the Resource Center represented the inmate population of the Louisiana State Penitentiary in a mediation of disciplinary issues conducted with the assistance of the Community Relations Service of the U.S. Department of Justice. The negotiating sessions, after several months of work, produced agreements on revised rules of conduct (with corresponding schedules of penalties for violations of the rules) and a

new institutional rule book to convey this information.

From our examination of the cases, we became aware that large gaps existed in our knowledge of disciplinary practices. (Our case-tracking has recently been memorialized in a special supplement to the Prison Law Reporter. This was composed of a bibliography of federal and state cases and significant law review articles on the major topics of correctional law, of which discipline formed a significant part.) Just now, when the volume of pending litigation seems to be arousing broad interest in changing existing procedures, the absence of a source of base-line data on existing disciplinary practices seemed particularly regrettable and appeared likely to make a difficult task harder.

Good law cannot be made in a vacuum. The number and variety of cases dealing with prison discipline was such as to make it probably inevitable that the Supreme Court would ultimately look at this matter. Our concern with that anticipated examination was that it would not be sufficiently grounded in the experiences of correctional agencies. A comprehensive national survey of state and federal practices was needed. Consequently, we began last fall to collect institutional handbooks and administrative regulations in an attempt to overcome this deficiency. After this work began, the Supreme Court did indeed agree to hear a prison discipline case, Wolff v. McDonnell, No. 73-679, this year. It is likely, therefore, that before too much longer the guiding principles in this area will be enunciated. The uncertainty which has plagued correctional administrators and prisoners alike as they try to glean direction from non-congruent cases arising from diverse factual circumstances will be displaced by rules anchored on constitutional bedrock.

There is another reason to welcome this development quite apart from the resolution of conflicts in the cases. As will be seen below, 75% of the most commonly identified elements of disciplinary process are available to inmates in a majority of jurisdictions in each case. This is not, however (except where a case or statute so dictates), on the basis that the procedure is a "right." This broad employment of so many elements does not, apparently, even represent agreement that the disciplinary process must be based on accurate fact determinations, which the various procedures promote or make more certain. Those who debate the disciplinary process do not agree on its purpose.

Whatever other purposes they may have, prison discipline systems exist in part to punish misconduct. Because the punitive sanctions employed may be severe -- including the effective lengthening of a prison term -- we believe that the Due Process Clauses of the Constitution apply and mandate adherence to procedures calculated to bring about fundamentally fair results. Consequently, we have referred to various of the elements of disciplinary process as "rights". Suffice it to say th

by so characterizing them we do not mean to imply that their status has been settled. The pending Wolff case may help us to apply a permanent designation.

This survey is designed to serve two purposes. First, it reports on the individual judgments the states have made about the correct disciplinary procedure. We believe this report depicts with substantial accuracy the disciplinary practices which the states now employ. Some of these stem from the coercive effect of a court order. Some are rooted in state statutes. Others represent the local adoption of national standards, such as those proposed by the Association of State Correctional Administrators. They share the trait of operating to guide behavior on a daily basis. Whether individual states have properly evaluated the competing individual and societal values is uncertain; that a weighing has taken place in each jurisdiction is undeniable.

Second, the report shows the sum of many individual judgments. It depicts the collective judgment of correctional administrators, judges, lawyers, prisoners, and others about the appropriate balance of interests. Without some such tool the individual judgments of vocal or well placed individuals might be inordinantly magnified.* With a report like this, the virtually complete lack of empirical data on actual disciplinary practices is somewhat overcome.

The Resource Center's goal in embarking on this study was to make a modest contribution to the current process of determining fair prison disciplinary procedures. This we hope we have done.

*For example, the director of the Federal Bureau of Prisons recently characterized nearly complete due process in disciplinary proceedings as "totally unnecessary and unworkable besides." Carlson, Interview, 5 Corr. Dig. 2 (Jan. 23, 1974). The survey results seem to indicate this statement is hyperbole rather than hypothesis.

II. LIMITATIONS OF THE SURVEY

The survey findings which follow are based on the Resource Center's analysis of material derived from four principal sour A description of these sources will help the reader to understand the survey's limits and use the results.

SOURCES

1. Resource Center Files. In pursuit of its "clearinghouse" responsibility, the Resource Center has been collecting state regulations, law suit pleadings, reports, pertinent law journal articles, etc., since its inception in 1972. In November, 1973, letters were sent to each state department of corrections requesting their inmate handbooks or other statements of institutional rules and regulations to which inmates are subject. Over 80% of the states responded to this inquiry, resulting in a substantial expansion of our holdings. In an appendix we have listed the handbooks and rules made available to us. In about a dozen states, supplemental telephone contact was made to close major gaps in the data.

2. New Jersey Supreme Court Files. Avant v. Clifford, Docket No. 22-73, is now pending in the Supreme Court of New Jersey. Among other matters, the case puts in issue the right of inmates of New Jersey penal institutions to confront their accusers at disciplinary hearings and to cross-examine adverse witnesses at those proceedings (procedures which are not now in force). During oral argument on November 21, 1973, a justice of that court asked counsel for the state what the practice of other states was with respect to those rights. The state's attorney replied that he was uninformed on the point but that a survey would be undertaken and the court would be advised of the results. By December 4, 1973, Joseph T. Maloney, Deputy Attorney General, had written all state attorneys general and counsel for the Federal Bureau of Prisons. Follow-up letters to non-responding jurisdictions were mailed on January 4, 1974. A total of 43 of the 54 jurisdictions solicited responded. On February 8, 1974, the New Jersey 45 page report, denominated "Supplemental Brief and Appendix for Respondents," was filed. It summarized the thousands of pages of data collected. No copies of that material were made, because of its volume, but the entire collection was filed with the clerk of the cour Resource Center staff have examined this material at the clerk's office. We have included the state's recapitulation of the da as an appendix to this report.

3. Files of Mr. Justice Mathew O. Tobriner. In March, 1972, Mr. Justice Tobriner of the California Supreme Court initiated a survey of prison disciplinary practices. All but nineteen states provided him with substantive responses. Two articles have resulted from it: Tobriner, Due Process Behind Prison Walls, The Nation 367 (Oct. 18, 1972), and Vanderet,

Procedural Due Process in California Prisons, 48 Cal. St. Bar J. 669 (1973). The base data Mr. Justice Tobriner received was made available for inspection at our offices.

4. Law Journal Articles. A partial bibliography appears in an appendix.

From the above listing of sources and the survey findings themselves, one can infer the limitations of the survey. Lest there be any misunderstandings, we have set these forth below:

1. The report only deals with the generally applicable procedure for handling major disciplinary cases. This means that we have tried to ascertain and report on those policies which have statewide applicability. Where this was not possible, the practice reported is that in effect at the state's maximum security prison for men. We chose to focus on that institution because it is there that the disciplinary issues are probably most finely drawn.

Many states are adopting a two-tier disciplinary system. The first level is reserved for informal and summary adjustment of discipline problems. Most commonly in the exercise of delegated authority, any staff member who observes a minor rules infraction may counsel with the offending inmate and, if necessary, he may impose a sanction of quite limited impact and duration.* The second level is reserved for serious "beefs". It is here that a variety of safeguards begin to become effective. It is here that we focused.

2. All data is not given for each state. As previously noted, we relied substantially on the collection and analysis of written materials. Although we endeavored to close the main gaps in our data by direct contact with the particular department of corrections, we did not reach a knowledgeable spokesman in every instance.

3. Even where materials were available, it was not always possible to ascertain the state's practice. These "unascertained" practices are reflected in the chart in Section III as vacant cells. Rather than introduce biases into the data display, we avoided presumptions and speculation and only classified a state practice when it was fairly clear from the data made available to us.

*The National Advisory Commission on Criminal Justice Standards and Goals has recently suggested a bridge between the two tiers. Simply, when an inmate is dissatisfied with the informal process, he may obtain a review of the adverse action. See National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, Standard 2.12 (1973).

4. The data are unverified. We have reported state practices as enunciated in the materials we reviewed. No independent field check of actual performance was undertaken. This is a significant observation because we have received assorted allegations from inmates (also unverified) that various protections have in fact not been provided in particular cases. Since we have personally observed such divergencies between claim and compliance, we tend to give such inmate complaints some credence. Nevertheless, our characterization of practices as "claimed" and similar terms is not intended in any pejorative sense. Such terms are intended only to remind the reader of the need for additional research in this field.

III. SURVEY FINDINGS

As the following chart and narrative indicate, most states claim to afford substantial rights and protections to inmates facing disciplinary charges.

For example, all of the states for which we were able to ascertain a policy provide the following procedural protections to inmates accused of intramural violations: (i) a set of written rules which specify conduct violative of the rules; (ii) an impartial tribunal to sit in judgment of alleged violations; (iii) the right to personally appear before the tribunal; (iv) the right to hear the evidence of the violation; and (v) the right to make a statement on his own behalf.

An additional five practices are followed by more than 90% of the jurisdictions with clear policies: (i) the accused inmate receives a copy of the rules of the institution; (ii) the inmate is given a written notice of charges against him in advance of a hearing; (iii) he also receives advance notice of the time of the hearing (although this may not be written); (iv) the inmate may appeal an adverse determination; and (v) some hearing record is made. As regards this last item, it should be noted that one third of the states have no stated policy.

We found one further group of practices on which at least 75% of the states enunciating policy agree. However, in contrast with the first two groups of practices reported above, where the affirmative responses were in the 40's and 50's, in this final group they are in the 20's and 30's. The five practices include (with number and percentage of affirmative responses indicated): (i) the inmate may have counsel-substitute at his discipline hearing - 39 states, 89% of ascertained practices; (ii) the tribunal renders the decision in writing - 38, 88%; (iii) the tribunal bases its decision solely on the evidence presented at the hearing - 29, 85%; (iv) the inmate is notified that he may appeal an adverse finding - 27, 84%; and (v) the inmate may secure a continuance in order to prepare his defense for the hearing - 27, 79%.

Three other practices also have majority support among those states with an adopted position: (i) the inmate may confront accusing witnesses - 31, 64%; (ii) the inmate may call relevant witnesses - 29, 59%; and (iii) the cross-examination of adverse witnesses is permitted - 28, 57%. As with the preceding group of practices, many of the states have not taken an ascertainable position on these issues. And, as the following narrative indicates, some states impose substantial restrictions on these procedures.

Each of the last three practices about which we inquired has few adherents at this time. Only 11 states relate specific sanctions to offenses in their written rules. Similarly, only 11 states expunge the inmate's record if he is found not guilty of the charged offense. Finally, just 14 states permit counsel to represent the inmate at disciplinary proceedings.

These findings are graphically depicted on the next page, and the narrative discussion of them begins thereafter.

ELEMENTS OF DISCIPLINARY PROCESS	ALA	ALASKA	ARIZ	ARK	CAL	COLO	CONN	DEL	D.C.	FLA	GA	HAWAII	IDAHO	ILL	IND	IOWA	KAN	KY	LA	MAINE	MD	MASS	MICH	MINN	MISS	MO	MONT	NEB	NEV	N.H.	N.J.	N.M.	N.Y.	N.C.	N.D.	OHIO	OKLA	ORE	PA	R.I.	S.C.	S.D.	TENN	TEXAS	UTAH	VT	VA	WASH	W.VA	WIS	WYO	U.S.	No. of Affirmative Responses	No. of Affirmative Responses as a % of Approved Practices
1. Written Rules Specifying Offenses	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	45	100%
2. Rules or Specific Sanctions Communicated to Offenders																																																						11	25%
3. Written Rules on Copy of Inmate Handbook																																																						44	98%
4. Inmate Receives Written Notice of Charges Before Hearing																																																						44	98%
5. Inmate Receives Prior Notice of Formal Hearing																																																						44	98%
6. Inmate Tape-Recorded Conduct of Hearing																																																						42	100%
7. Inmate Permitted Assistant for Hearing																																																						27	73%
8. Inmate Permitted Assistance from Counsel Substitute																																																						51	100%
9. Inmate Permitted Evidence																																																						52	100%
10. Inmate Permitted to Question Witnesses																																																						52	100%
11. Inmate Copy of Report Submitted																																																						29	56%
12. Impartial Decision Maker																																																						31	64%
13. Inmate May be Represented by Counsel																																																						28	57%
14. Inmate May be Represented by Counsel Substitute																																																						14	37%
15. Inmate May be Represented by Counsel Substitute																																																						39	89%
16. Decision Based Solely on Evidence at Hearing																																																						29	85%
17. Decision Rendered in Writing																																																						38	88%
18. Records Made of Hearing																																																						31	91%
19. Inmate May Appeal Decision																																																						44	98%
20. Inmate Notified of Appeal																																																						27	84%
21. Record Expunged if Guilt Not Established																																																						11	35%

1. Written Rules Specifying Offenses
2. Rules Provide Specific Sanctions for Specific Offenses
3. Inmate Receives Copy of Rules

The existence of a right to disciplinary hearings (and the procedures they involve) has been a primary focus of recent professional attention. But the disciplinary process begins with the promulgation of institutional rules and regulations. Our survey revealed that the states uniformly report compliance with the fundamental requirement that these rules be written. We also found that all jurisdictions, save one, claim to distribute these written materials to the inmates. However, only a quarter of the states with ascertained practices also give the inmates guidance regarding the santions which may be imposed for established violations of the rules.

A set of rules detailing the prescriptions and proscriptions of an inmate's daily routine gives him notice as to what constitutes undesirable conduct. This facilitates the avoidance of disciplinary problems. Conversely, the lack of such prior notice may contribute to an inmate's belief that disciplinary authority will be exercised arbitrarily, which may itself create or exacerbate disciplinary problems. Moreover, the absence of such rules would appear to violate the fundamental due process precept that it is unfair to hold a person responsible for his conduct without giving notice of the operative constraints. All of the 44 jurisdictions with ascertained practices have developed written rules.

Of course, the existence of some rules hardly constitutes an adequate response. Examination of the institutional rules which we collected indicates that while almost all of the states enumerate offenses for which an inmate may be punished, many of the listed infractions are so vague and indefinite that it is difficult to differentiate between what might be permissible conduct and what might constitute a violation. For example, in New York at the Attica Correctional Facility, "offensive and unhygienic acts and activities anywhere in the facility," "cheating," and "insolence" may subject an inmate to discipline. Other prohibited actions which are included in inmate rule books of various prisons are: "disrespect or lack of cooperation," "lying," and "miscellaneous offenses" (which is defined as "any infraction not specifically listed" in the Alabama institutional handbook where we found it). The existence of such overbroad or vague rules may lead to abuse of discretion on the part of the correctional officers. Further, the existence of such poorly drafted rules would seem to make the officer's job of detecting and reporting misconduct more difficult. At least three jurisdictions, Minnesota, South Carolina, and the District of Columbia, have addressed this problem by attempting to define each punishable offense listed in their rule books. This gives inmates clear prior notice of proscribed conduct. It will also make any hearing and review procedures more efficient by providing a focus for the presenta-

tion of evidence. The final advantage to clear rules lies in the ease with which they may be treated in training programs, as compared with general statements. (The McKay Commission, which investigated the Attica uprising, found that new officers "had almost as much difficulty as new inmates in ascertaining what the rules were." Attica 74 (Bantam ed. 1972).)

Another problem with the written disciplinary rules now in effect is that, unlike the statutory criminal law, a majority of the states' inmate rule books do not contain a breakdown of specific punishments provided for specific offenses. While all states mention some range of dispositions (e.g. counsel and reprimand, loss of privileges, segregation, loss of good time, and various combinations) only 25% of the states tie in or correlate specific punishments or ranges of punishments for each defined offense.

Therefore, except for limits on the duration of a punishment, in most states the disciplinary tribunals have virtually unfettered discretion regarding the imposition of penalties. As a consequence, an inmate in most states is left to suspect the worst. The absence of rules having a hierarchal ordering or stipulated dispositional range may lead to a suspicion that one is being arbitrarily dealt with, which contributes to unrest.

Our survey revealed 11 states which have tied punishments to offenses. In Alabama, for example, each offense has a specific, fixed punishment that may be imposed. In other jurisdictions, such as Minnesota and the District of Columbia, offenses are grouped together to form limited categories. Within relatively narrow boundaries, a range of penalties is listed for each of the categories. The penalties appear to be related to the nature of the violation, with what we deem to be the more severe offenses punished more severely.

We noted that many inmate handbooks do not include a description of the disciplinary procedures employed for handling rule violations. Even in those which did discuss procedure, the explanations were sometimes so imprecise or unclear as to be simply inadequate. Most states supplement these handbooks with administrative regulations that set forth the established procedures. However, these regulations are not uniformly distributed to the inmates. One common form of distribution has been the posting of the regulations somewhere in the facility. This method may well be inadequate. It would appear to be better procedure to include a fully informative description in the handbook and to have this recitation printed as part of, or distributed along with, the notice of charges which inmates are given.

4. Inmate Receives Written Notice of Charges Before Hearing
5. Inmate Receives Prior Notice of Time of Hearing
7. Continuance Allowed to Prepare Defense

The states appear to have widely recognized the significance of the pre-hearing period in the disciplinary process. Virtually without exception, an inmate accused of violating an institutional rule receives a written notice of the charge against him and he is advised when the hearing will be held. Frequently he can obtain a delay in the hearing if necessary to prepare a defense to the charges.

As is true in the criminal justice system, what happens before the disciplinary hearing may be more important in determining the outcome of the proceeding than the hearing itself. The period between the occurrence of an alleged offense and the hearing should be a time for preparing the best available defense to charges. Because confinement status, good time credits, parole eligibility and similar important interests may all be affected by the outcome of a disciplinary hearing, it is essential that an inmate accused of an intramural offense receive notice of the charge and the hearing date and that he have an opportunity to investigate the facts and prepare evidence in his own behalf.

Although our survey revealed a variety of procedures, most states initiate the disciplinary process with a disciplinary or incident report, which a staff member completes. Typically, the inmate named in the report receives a copy of it. This becomes his notice of the charges. In light of the observed vagueness and generality of many of the rules which may form the basis for a misconduct report, the clarity and completeness of the notice the inmate receives is crucial. Minnesota and Louisiana have two of the more complete notice forms. Each includes a specification of the regulation allegedly violated; the name of the reporting officer; the time, date and place of the incident; the names of the witnesses; a summary of the evidence regarding the violation; and the tentative hearing date. A number of states incorporate notice of the procedural rights of the accused inmate with the notice of the charges. Other states have this information in the inmate handbook; some have it posted in the institution. Regardless of the means employed, the inmate's attention should be drawn to this procedural information at this time.

As previously noted, many jurisdictions provide insufficient notice of the punishment which may be imposed upon establishment of a rules infraction. Since there is typically an option for a plea of "guilty" to the charges, states should explicitly indicate, along with the notice of the charges, the sanctions authorized or commonly imposed for the violation charged.

The states are almost uniform in providing that the hearing will take place within a few days of the alleged violation.

This appears to be salutary, because it means that the event will be fresh and sharp in the minds of the accused and the witnesses. Too great haste, however, may possibly work against the inmate and diminish his ability to mount a proper defense. This would be the case when the scheduled hearing date comes before the inmate, or his counsel or counsel-substitute, if allowed, has been able to complete the investigation on which his defense would be predicated. Of the 34 states with ascertained practices in this area, 27 or 79% make provision for a continuance. Some states, such as Colorado, allow a continuance at the discretion of the hearing body. Others, like Louisiana, Oregon, and Nevada grant one continuance as a matter of right. These continuances are often limited in time, such as a maximum of five days in the case of Louisiana, and one week in the case of Colorado.

In addition to time, the inmate also needs to have access to relevant evidence in order to prepare his defense. This can be done either by the inmate personally, or by his representative. South Carolina allows the inmate's representative to interview witnesses and other participants in the incident in order to present this information at the hearing. Alaska and Connecticut similarly provide for the representative to do whatever investigation is necessary to ready a defense for the hearing.

In most states, some prison official is called upon to determine the inmate's status during the pre-hearing period. Typically, administrative segregation is authorized when the inmate is considered to be a threat to himself, another inmate or a staff member, or when he constitutes a threat to the security of the institution. Some inmates have claimed that close pre-hearing confinement is routinely ordered. Although this is doubtless an exaggeration, anyone so confined needs more than just time to prepare a proper defense to disciplinary charges. In some 39 states the inmate may have the assistance of a counsel-substitute at his disciplinary hearing. Twelve of these, and two others as well, allow retained counsel. But, to be fully effective, this representative probably should be assigned to the inmate as soon as he is accused of an offense. This representative should be allowed to investigate the case in the inmate's behalf. Such an investigation should include the right to interview witnesses, including the reporting officer, and to examine any pertinent documentary evidence. Presumably, all the witnesses and evidence are within the institution, making a continuance of more than one week, if needed at all, seldom necessary. Early appointment of this representative would appear to be most important when the institutional disciplinary proceeding is going to be held in abeyance pending a determination by the appropriate prosecutorial officer whether to initiate criminal charges. Competent legal counsel, rather than a staff member or law student or another type of substitute, is necessary in these circumstances.

6. Impartial Tribunal Conducts Hearing

The importance of an unbiased fact-finder has been recognized by correctional authorities no less than in society at large. Indeed, all of the jurisdictions with an ascertained practice require that an impartial tribunal conduct the disciplinary hearings. For our survey, an impartial tribunal was defined as one on which the charging officer and any witness could not sit.

The most common practice seems to be the creation of a three member body which jointly exercises the decisional function. The board's composition usually is "one from security, one from treatment, one from administration." This last individual, usually an associate or deputy warden, is chairman. Several states appear to allow inmate participation on the board in a voting capacity with the consent of the accused inmate. Whether these measures do produce an "impartial" tribunal in fact is not clear.

Impartial literally means "not partial." Partial itself means "inclined to favor one party more than another." Definitionally, therefore, more is apparently required than disinterestedness in the particular case. But it is only this quality that the typical rules seem to address. If we look to the similarity of age, educational preparation, community and ethnic background, which mark correction officers, and add the factor of the shared work experience, then at least one member of the typical board may be "inclined" to favor a particular side. Since correctional bureaucracies have tended to be built from within, the representative of "administration" may have this same "tilt". Since staff and inmates rotate through various assignments over time, it is possible that members of the disciplinary board have previously encountered the accused inmate and they have developed fixed views about him. This latter bias problem can be alleviated by encouraging board members to withdraw from a case whenever they have developed such opinions. Since board membership is usually rotated among a number of staff members, qualified alternates should be readily available.

There is also the possibility that simple membership on the disciplinary board produces a biasing effect. Unless the need for impartiality is stressed (and agency regulations pay no more than formal obeisance to that objective) board members may misconceive their role and, consequently, not perceive that accuracy in fact-finding is a minimum requirement. Correctional workers believe they need to "back" each other. It is important that they leave this attitude at the hearing room door, if the goal of impartiality is to be attained.

Problems such as these have stimulated interest in developing means for attaining true impartiality. A variety of approaches have been proposed. They should be carefully examined

and implemented if they represent better solutions than we now have. It has been suggested, and several states have taken that path, that only relatively senior personnel sit on disciplinary boards. The underlying assumption of this approach is that this increases the chance of having board members who are capable of objectivity. Another possible solution to this problem is the inclusion of outsiders, such as lawyers, on these boards. This has been suggested, but not implemented, for Massachusetts. It appears that outsiders do hear the graver offenses committed in British prisons. So far as we are aware, however, the Baltimore City Jail is the only facility in this country where an outsider decides disciplinary matters. Because the practice is of recent vintage, there is as yet no verified information on the effect of the practice. Another approach might be to use probation or parole personnel on disciplinary boards. As correctional workers, such individuals might win acceptance by the line staff while maintaining a respectable distance from the possible skewing effect of the institution itself.

8. Inmate Personally Appears at Hearing
9. Inmate Hears Evidence
10. Inmate May Make Own Statement

All states recognize these fundamental rights. However, they were not always specifically set forth in inmate rule books. When this was the case, their existence was easily inferrable from the explicit granting of more controversial rights, such as cross-examination. Generally, we found that it was those states which deny the more controversial rights which made explicit reference to the right of appearance and allocution.

Most states probably recognize, but only a few so state, that the hearing body can take private testimony whenever it believes that revealing the identity of a witness would subject him to the possibility or threat of harm. This type of limitation on the right to hear the evidence was sanctioned in Morrissey v. Brewer.

A substantial number of states have made provision for the pre-hearing investigation of disciplinary charges. In these cases, a specially designated employee is responsible for verifying and supplementing the initial misconduct report. The investigating officer then reports on his findings to the disciplinary board. The board then may call witnesses or request additional investigation before reaching its decision. What the inmate usually hears in these states, therefore, is evidence once removed (i.e. hearsay.) Granted, the formal rules of evidence would probably be inappropriate at disciplinary proceedings. But the question remains whether this technique does not eliminate procedures for testing a witnesses' truthfulness and powers of observation without making an adequate replacement.

This "investigating officer" approach also injects a new element into the determination of the impartiality of those administering the disciplinary procedure. At the least, fairness would seem to require that the impartiality requirement should attach to the investigator as well as the tribunal, unless the accused inmate can insist as of right on hearing the direct evidence against him.

The materials we inspected were silent on the duty of the investigating officer to bring forward exculpatory as well as inculpatory information. This issue, as well as those raised above, certainly deserves consideration in future research.

None of the states express a limit on what the inmate may say in his own behalf. Doubtless, the hearing board can require the inmate to observe a reasonable durational limit. Considerations of relevance and materiality may also operate to limit an inmate's statement. As previously noted, only 11 states give effective information about the potential consequences of a finding of guilt. This tends to reduce the usefulness of the opportunity to speak, since the inmate cannot really argue in mitigation of punishment if he doesn't know what it may be. Many inmates are inarticulate, and this would further diminish their ability to make use of the right to make their own statement.

11. Inmate May Call Relevant Witnesses

There are some 29 states which provide that inmates may call witnesses in their own behalf at disciplinary hearings. (Missouri, although not specifically stating that witnesses can be called, indicates that an inmate may present information available to him and others to the board. Arguably, therefore, it is a 30th state in this category.) In a few additional impartial states, such as Illinois and Ohio, the inmate can request that the tribunal interview certain witnesses, and in the discretion of the board the requests may be granted. In most of those states it appears that the board ordinarily complies with such requests unless it feels that the testimony will be totally irrelevant to the proceedings.

However, in almost all of the states that permit witnesses for the inmate, certain limitations are imposed by the rules. These usually center around the number of witnesses that may be called. For example, Delaware allows the inmate the right to call five witnesses in his behalf, after which the board has the discretion to permit more. In Minnesota, the limit is three witnesses, while in the District of Columbia, the limit is two. Most other states do not specify any fixed limitation on the number of witnesses, but usually reserve to the board the option of denying certain testimony that it feels is merely cumulative or repetitive. Two states, Nevada and Wisconsin, limit the

witnesses to individuals who have personal knowledge of the allegations.

Affording the inmates the right to call witnesses in their own behalf is an important corollary to the right to make one's own statement. Where an inmate's self-interest is at stake, the observations of such third parties may even be a preferable means of "getting the facts out," since the credibility of a third party may exceed that of the accused. (The fact of the witness' prior conviction may give grounds for attacking his veracity, but it does not eliminate it.) The hearing boards of course, have the discretionary authority to control the number of witnesses they will hear. If those powers are not abused through overuse of "irrelevant" and "repetitious" testimony limitations, the minimum basis for factual determinations will exist.

12. Inmate May Confront Adverse Witness
13. Cross Examination of Adverse Witnesses Allowed

The right to confront accusing witnesses and to subject their testimony to cross-examination apparently are among the most controversial procedures the states have examined for applicability to the disciplinary hearing. Nearly as many states deny these rights as grant them; only three or four states lack clear policies. Twenty eight states (53% of all the jurisdictions in our survey) permit both of these procedures. Three additional states permit confrontation but not cross-examination. (For purposes of the survey we did not classify as an affirmative response the following practices: (i) the hearing board conducts the cross-examination based on questions submitted by the accused inmate; (ii) the calling of adverse witnesses and their cross-examination is totally discretionary with the board; and (iii) the presentation of evidence by an investigating officer rather than witness.)

The implementation of these rights in the various jurisdictions falls into a few separate categories. First, there is the procedure employed by a few states, of which Arizona and South Carolina are typical, where an inmate is permitted to cross-examine his accuser only through his representative. For example, in Arizona, the inmate is entitled to hear all witnesses against him, and his counsel is entitled to examine such witnesses. However, if the prisoner is representing himself or is represented by another prisoner, he presents his questions through a staff member designated by the disciplinary committee. In Tennessee, another state in this group, cross-examination can only be done by and through a "resident advisor" (who is a lawyer representing prisoners at disciplinary hearings on a full time basis.)

A second group of states stipulate that the right to confrontation and cross-examination is afforded only when the possible penalty is of a "grievous" nature. In Delaware, for ex-

ample, "grievous loss" is defined as the possible imposition of more than five days in solitary confinement or the loss of five days' good time. Hawaii permits confrontation and cross-examination when the prisoner is threatened with placement in solitary confinement for an indefinite period. Other states having such limitations are Maryland, Nevada, and South Dakota. Each sets forth its own definition of "grievous loss." Maine may also be in this category. It allows a substantial number of procedural safeguards to come into play, including confrontation and cross-examination, when the offense allegedly committed by the inmate constitutes a crime under the laws of Maine or of the United States.

While the remainder of the 28 states allowing cross-examination do not impose such restrictions on the procedure, most states, including those mentioned above (e.g. South Dakota, North Dakota, Virginia, District of Columbia), do restrict confrontation and cross-examination for "good cause". This most commonly applies when non-disclosure of the identity of a witness is necessary to protect him. For example, in the District of Columbia the prisoner has the right to confront and cross-examine an informant unless the board finds in a particular case that disclosing the informant's identity would pose a threat to his physical health or safety. If cross-examination becomes inflammatory at a disciplinary hearing in Maryland, the hearing officer may conduct the examination himself.

The three states which allow confrontation but not cross-examination are Alabama, Ohio and Pennsylvania. In Ohio, the inmate may only question his accuser by submitting questions to the chairman of the hearing board.

The practice in New Mexico is illustrative of procedures which we did not consider to present an opportunity for meaningful confrontation and cross-examination. There, a hearing officer functioning as an impartial agent investigates and reports on all alleged facts concerning the rule infraction, including interviewing both the inmate and his accuser. At the disciplinary hearing this agent may be questioned by the inmate or his counsel as to the facts he found. However, no inmate or inmate's counsel may directly confront correctional officers or witnesses before the board. As a result, it is only the agent's power of recollection which may be tested, not the credibility or powers of observation of the actual witnesses.

Despite such shortcomings, a majority of states do recognize that confrontation and cross-examination of witnesses are essential ingredients of disciplinary hearings. They appear to realize that when facts are in dispute it is imperative that the accused be allowed these procedural safeguards. Cross-examination has a venerable history and is accepted as one of the most important devices known for ferreting out the truth.

Many of the recent cases dealing with the issue of what constitutes due process and "fairness" in prison disciplinary hearings recognize confrontation and cross-examination as critical to the proceedings when the interests of the inmate involved are substantial. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); United States ex rel. Neal v. Wolfe, 346 F. Supp. 569 (E.D. Penn. 1972). Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973); Inmate 24394 v. Schoen, 363 F. Supp. 683 (D. Miss. 1973). Rule infractions usually become an indelible part of an inmate's institutional record and, apart from the imposition of any direct penalty, may also influence parole consideration. Even if such direct sanctions as the temporary loss of some privileges are not substantial, surely denial of parole and the consequent longer term in confinement would meet the test.

Many correctional officers vociferously resist the notion of inmate questioning guard. They believe this undermines the relationship on which good institutional order must rest. However, the experience of jurisdictions granting the cross-examination right does not support this belief. This is clear from the material collected recently by the Attorney General of New Jersey in connection with Avant v. Clifford. (See Appendix B for the state's interpretation of this material.)

Many of the 43 responding states indicated that since their procedures had been adopted quite recently, it was difficult to ascertain and evaluate the consequences of their implementation. Fifteen states did express an opinion, however. Fourteen of these states indicated that permitting confrontation and cross-examination had no noticeable effect on prison security or safety. Furthermore, there was general agreement that the quality of the hearings had been "upgraded" and that some of the inmate feelings of powerlessness and frustration had been relieved. In a letter dated December 13, 1973, Assistant Attorney General John Henry Brown of Washington, indicated that although new disciplinary procedures initially met with some staff resistance, most inmates and a sizeable number of correctional staff now feel the new procedures to be "fairer." Tennessee Assistant Attorney General W. Henry Haile, stated in a letter dated December 10, 1973 that:

> The rules have not had a noticeable effect on inmate disciplinary problems. Nor has cross-examination had any effect on prison security (and) order...On the whole our experience with cross-examination...has been good and the inmates seem to think they get a fair shake before the disciplinary board, and our statistics indicate this is true.

Some of the critics of "due process" hearings assert that the result of new procedures will be fewer violation reports initiated by staff. Generally, the attorneys general did not find

a decline in the number of rule violations reported, although some states indicated that there was an initial decrease when the new procedures were instituted. However, once staff realized that these procedures were not destructive of the prison system, the number of reports increased to previous levels.

Only the reply from New Hampshire voiced displeasure and concern with confrontation and cross-examination. However, the letter dated January 9, 1974 from Assistant Attorney General, David W. Hess, indicated that this was largely due to starting-up difficulties which "slowed down the disciplinary process and consumed an inordinate amount of time on the part of prison officials and administrators."

14. Inmate May Be Represented by Counsel
15. Inmate May Be Represented by Counsel-Substitute

A total of 41 states allow an accused inmate to have counsel or counsel-substitute at disciplinary hearings. In 39 states (89% of those with an ascertained policy), representation is limited to counsel-substitute. But a growing number, now 14, allow retained counsel, and, in certain circumstances, even appoint an attorney to represent the accused.

The details of these plans vary from state to state. In Connecticut, the inmate chooses his representative from a list of staff members who have volunteered to assist inmates at disciplinary hearings. He puts down his top three choices and is assigned his highest choice who is available. New York automatically appoints an employee to act as counsel, while Oklahoma allows representation by either an employee or another inmate when the accused is incapable of presenting his own case. Several states allow for an inmate representative but, significantly, limit his potential effectiveness by prohibiting him from cross-examining accusing staff members.

Over a third of the states with stated policies on the matter allow inmates to retain counsel for disciplinary hearings. Arizona states that an inmate may be represented by an attorney at any disciplinary hearing-provided that he bears the cost. If he cannot do so, he is entitled to have a staff member or another inmate act as his representative. Kansas and Delaware, in addition to allowing retained counsel or counsel-substitutes, appoint counsel whenever a disciplinary proceeding involves behavior which also constitutes a criminal offense.

Most states now recognize that an inmate needs some sort of aid to adequately present his case to the disciplinary board. This becomes more obvious as the disciplinary procedures become more and more complicated with multiple levels of operations and options. The need for a spokesman is underscored by the fact that many inmates are inarticulate.

The same factors which support the need for some form of assistance at disciplinary hearings--their growing complexity, the severity of the possible sanctions, etc.--suggest some potential weaknesses in the counsel-substitute approach to meeting the need. In order for any such program to be successful, it is essential that the accused have confidence in his representative and that the representative have the requisite skill and independence to properly represent his client's interests. A program which limits representation to staff members or fellow inmates may be open to the criticism that the accused inmate doesn't get the effective assistance that seems to be promised.

The inmate should be given as broad a choice as possible in selecting his representative. Because this person is supposed to help the accused, the inmate should be allowed to choose among willing staff members, inmates or other responsible persons. One problem with limiting representation to staff members or inmates is the possibility of pressures from prison administrators or staff members. The staff advocate who successfully cross-examines the reporting officer or succeeds in winning a dismissal of the charges may find himself ostracized by his fellow employees. Similarly, an inmate advocate may jeopardize his parole release by a too vigorous defense of his "client." These pressures may reduce the effectiveness of such representatives.

A second problem with using lay advocates is that they may be unfamiliar with the disciplinary procedures or how to effectively represent the accused. An effective representation program should include a training program on the procedures in force and the techniques of representation. (This is not to suggest that lawyers automatically will be effective advocates or that all lawyers are knowledgeable concerning disciplinary procedures. However, disciplinary procedures are sufficiently similar to others with which counsel will be familiar as to generate an expectation that the new field can be assimilated or learned without much difficulty. Correctional workers may object that outside lawyers don't understand the "realities" of institutional life. However, that lack of understanding may indeed be a major benefit since it could lead to the raising of important questions which "insiders" are inclined to avoid.) Whenever complex cases arise, the lay representatice should have an attorney with whom he can consult.

There are several ways in which these problems can be resolved. One possibility is to use law students as advocates. This avoids the potential conflict of interest problem, which is inherent in staff representation of an inmate before a staff tribunal, and minimizes scheduling conflicts which arise when employees act as representatives. Law students may require less training (although they will certainly require some) than staff members or inmate representatives and can often be supervised through law school faculty members. The District of

Columbia now uses such a program at Lorton Correctional Complex.

Those inmates who are able to provide their own attorneys should be allowed to do so. Not only would this free staff for other duties, but a trained attorney should be able to quickly narrow the issues and avoid needless repetition and irrelevancies. As previously noted, 14 states already allow the use of retained counsel. In addition, a number of courts have recognized the right to retained counsel. See Palmigiano v. Baxter, 487 F. 2d 1280 (1st Cir. 1973); Pearson v. Townsend, 362 F. Supp. 207 (D.S.C. 1973); Inmate 24394 v. Schoen, 363 F. Supp. 683 (D. Minn. 1973). Without a doubt, the major obstacles to the universal provision of counsel for disciplinary hearings are practical. Whether there are enough lawyers to handle the volume of hearings, or whether there is enough money to pay them, are important issues. There is scant empirical evidence on which to base conclusions.

A special situation arises when the disciplinary offense charged is also a criminal violation. The inmate is placed in the particularly precarious position of attempting to defend himself against disciplinary charges while preserving his rights in the criminal proceeding. (Indeed, in this situation the National Advisory Commission on Criminal Justice Standards and Goals has recommended deferring the disciplinary hearing. Report on Corrections, Standard 2.11.) In such cases it is essential that he have the assistance of counsel. See Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973) and Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971). Other appropriate instances for appointed counsel include those cases where the issues are very complex or when there are substantial mitigating circumstances, Gagnon v. Scarpelli, 411 U.S. 718 (1973).

16. Decision Based Solely on Evidence at Hearing
17. Decision Rendered in Writing

At least 14 states fail to explicitly require that disciplinary hearing decisions be rendered in writing. And 23 articulate no requirement that the decision must conform to the evidence presented at the hearing.

It is somewhat difficult to determine from an examination of prison rule books whether policy requires that institutional disciplinary decisions be based solely on evidence presented at the hearing or if other factors may be considered as well. Only 34 states directly address this issue. Of these, 29 states require a decision based solely on the evidence presented, while five allow other factors to be taken into account.

It would seem that there is ample relevant and material evidence for disciplinary boards to consider and that, therefore, the tribunal should, in the interest of fairness, be

limited to that data. Even in the most rudimentary situations, there will be a staff member's report, the inmate's response and explanation of his behavior, and physical evidence, (unless the charge is "insolence," "abusive language," or similar offenses attacking attitudes or speech.) In more elaborate circumstances, where counsel, counsel-substitute, confrontation and cross-examination may have been provided, there will also be testimony disclosing credibility or observation problems and the like. Such things as the inmate's attitude or parole date, his past behavior, staff members' impressions, or file materials containing information as to the number and nature of previous charges against the inmate should not be considered because they do not bear on the present charge.

These extraneous matters often creep in. The closed nature of the prison environment renders the "decision-based-solely-on-evidence-presented" objective virtually unattainable absent more specific safeguards. Most prisons provide for the appointment of the hearing body from members of the prison staff. This makes it likely that one or more disciplinary committee members will know the prisoner and/or have seen his file already. Impressions of the inmate's general attitude and previous incidents, good or bad, may thus unavoidably infiltrate the decision-making process. It may be just such problems which prevent states from seeking to achieve this standard.

What happens where this limitation is not in force? New York is one of the states which permits the consideration of evidence which does not bear on the present charge. It attaches a broader purpose to the disciplinary hearing than just punishment for a wrongful act:

> Adjustment Committee Action (b). The action taken by the committee shall be based upon its evaluation of the inmate's attitude and his overall adjustment to the discipline and order that must be maintained in the facility, as well as upon the committee's evaluation of the facts and circumstances of the particular incident described in the report or slip. The committee shall not be required to make a finding as to whether or not the inmate violated any particular rule or regulation and shall not direct the action it takes toward the objective of imposing punishment for a violation. The action taken by the committee shall be focused upon the need for maintaining discipline and order within the facility and the degree to which the inmate has been and it cooperating with that need.

Vermont has an approach similar to the "point system" used in traffic law enforcement. It provides for the written "reprimand" of inmates. This results in no action until three or more are accumulated during a four month period. If an infraction is deemed serious enough for consideration by the disciplinary committee by an investigating officer, its ultimate written finding

of the facts will include:

> Evaluation of evidence and rationale for the decision that reflects a consideration of all the evidence and your previous record of conduct in the Facility during your current sentence.

The "previous record" is apparently documented at least in part by written reprimands.

Procedures for prison disciplinary hearings should protect against the arbitrary and capricious exercise of power by prison officials. A requirement that disciplinary committee decisions be based solely on evidence presented at the hearing is basic to achieving that purpose. Without that safeguard, an inmate may be subjected to suffer "grievous loss," including a loss of privileges, a loss of "good time" or confinement in solitary quarters because of his "attitude" or other intangible circumstances. A written decision containing a clear, articulated rationale stated in terms of the evidence would appear to be essential to assure that the decision is, in fact, based on the available evidence.

There are currently 38 states which require a written decision. The prescribed contents vary widely. Some states require that the decision include a complete report of the initial incident, a summary of the evidence presented at the hearing, the actual decision, and the reasons for that decision. Other states simply give the inmate a written verdict.

It is interesting to note that the written decision requirement usually appears along with a right to appeal. Although the correlation is not perfect, it seems a frequent enough occurrence to indicate, along with language from rule books, that the written decisions are regarded as the basis of appellate review. The appeal body has simply to look at the written decision and make a determination as to whether or not the decision is just. Without a requirement that the initial hearing body's decision be based upon evidence presented, however, the written decision, even with a summary of evidence and a rationale, may not adequately serve the goal of fairness. In that case, any material from the inmate's files, his past difficulties or simply the infraction report alone would serve to support the "justness" of a decision. Only by requiring both that a decision be written and that it be supported by evidence presented can decisions based on personal, unarticulable feelings rather than on facts, be prevented.

18. Records Made of Hearing
19. Inmate May Appeal Decision
20. Inmate Notified of Appeal
21. Record Expunged if Guilt Not Established

States quite commonly make a record of disciplinary proceedings and allow an appeal from adverse decisions. Surprisingly, the inmate is not always advised of this appeal possibility where it exists. Only a few states appear to expunge the inmate's record when the disciplinary hearing outcome is favorable to him.

The verbatim transcript is the traditional device for preserving the record of criminal and administrative proceedings. A record of the proceedings facilitates the taking of an appeal and it also makes both sides more conscious of observing the procedural rules in force so as not to undermine their case on appeal.

For our study, a record of the proceedings includes not only a verbatim transcript but also a tape recording of the proceedings, or in the alternative, a complete summary of the evidence and findings of the board. Using this definition, over 90 percent of the jurisdictions which discuss the subject make some form of record of disciplinary proceedings.

There are various methods in use by 38 states. Ohio specifies that the testimony of each witness and the inmate shall be electronically recorded and preserved for three years. Arizona specifies that the hearings are to be recorded by a mechanical transcription device as well as having the disciplinary board prepare a summary or minutes of the cases heard. Vermont requires a written finding of facts including the charges, a summary of the proceedings and evidence presented, an evaluation of the evidence, and a rationale for the decision.

Obviously, the more complete the record, the more valuable it becomes on appeal. If a case is appealed with nothing more than the initial violation report and decision of the hearing board, the person considering the appeal does not have an adequate basis for his review. He is faced with a choice of either holding a de novo hearing or rubber-stamping the decision of the board.

There are also some problems with a record that merely consists of a summary of the evidence. The board may either inadvertently or intentionally omit important evidence or interchanges in its summary. If the inmate complains about one of these interchanges, the person hearing the appeal has no way to know whether the complaint is valid.

The best solution to the problem of preserving an adequate record may be in tape recording the entire proceeding. The tape can be preserved for a sufficient time for the appeal of adverse

decisions. This solution has the advantages that it is cheap to operate (after an initial capital investment), it is capable of being operated by a member of the board who must be present anyway, and it preserves the record for appeal. This was the method suggested by the court in Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973).

The opportunity of appeal serves several purposes. The appeal has been used in the criminal justice and administrative settings to correct mistakes made by the justice or hearing examiner at the initial level. It offers a way to invoke the greater impartiality that review by a disinterested person can often provide. These same considerations apply in the correctional setting. In addition, the review by a higher level official may allow identification of trouble spots in the system, and permit corrective action. The review will also let him make the punishments imposed by the hearing boards more uniform in those cases in which more than one board is in operation. Forty-four states provide at least one appeal as of right.

Equally important as the right to appeal an adverse decision is notice of that right. Many people involved in the criminal justice system are unaware that they have such a right. It is obvious that a large number of those inmates found guilty of rule violations will likewise be unaware of the appeals process if they are not so informed. But only 27 states give notice of the appeal right. Fortunately, this shortcoming can be easily overcome.

Perhaps the simplest form of appeal in use today is the automatic review of all hearing board decisions. Florida and Oklahoma both use this procedure. In Oklahoma, a Review Committee composed of members of the institutional staff who do not sit on the disciplinary board review all cases involving loss of good time or confinement to maximum security. The Committee can confirm the decision of the board or reduce the penalty. But it cannot increase the punishment. The warden reviews all the decisions of the disciplinary board and the Review Committee. He can similarly uphold or reduce the penalties imposed, but may not increase them.

Rhode Island provides that if an inmate is found guilty, he is then informed of his right to appeal the decision to the warden or acting warden. Following an adverse decision of the board, an inmate has 36 hours in which to file a notice of appeal stating his reasons for the appeal. The tape recording of the proceeding is then forwarded to the warden or acting warden who can decide to uphold the disciplinary board decision, reduce or suspend their decision, or order further proceedings. The rules also provide that the inmate can be assisted in his appeal by his classification counselor.

Indiana allows the inmate two levels of appeal. First, he has the right to appeal adverse decisions to the head of the institution. If he is dissatisfied with this decision, he can appeal to the head of the correctional system or his designate. Once again, the reviewer has no authority to increase the punishment.

At this point in time then, the states seem to agree that inclusion of some form of appeal procedure in the disciplinary process is a necessity. This is bolstered by a number of court decisions. See Palmigiano v. Baxter, 487 F. 2d. 1280 (1st Cir. 1973), Pearson v. Townsend, 362 F. Supp. 207 (D.S.C. 1973), and Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973). The main questions remaining are: How should the appellate procedure operate and what can be done to make it more effective?

One of the primary things which can and should be done is to have a complete record of the disciplinary hearing. This can easily be accomplished by a tape recording. A complete record of the proceedings allows the reviewer to quickly determine whether or not there are grounds for the appeal. It also decreases the chances that further hearings will be necessary.

Second, the inmate should be aided in his appeal by the same representative who helped in the hearing. The representative will be able to pinpoint those areas which require attention. This provides the inmate with a more effective appeal and again saves the reviewer the time of wading through a mass of data or considering inarticulate or spurious arguments.

Third, the reviewer should occupy a position where he does not have excessive contact with any of the participants in the hearing. This is necessary to insure his impartiality. Consideration should be given to appointment of someone not connected with the institution as the reviewer, such as a civilian review board. Otherwise, review should be by the head of the institution.

Finally, the reviewer should have the authority to override the recommendations of the disciplinary board. This should include reversing their decision, lowering the punishment, suspending sentence, or ordering further hearings. He should not, however, be allowed to increase the punishment since this would tend to inhibit appeals and might engender dissatisfaction among the inmates.

Apparently, few states have faced the issue of expungement of inmate records when guilt is not established. But this is every bit as important to the inmate as how the hearing board makes its decision. An inmate's disciplinary record has a major effect on his life in the institution and his ultimate release date. Classification, work assignment, privileges and parole eligibility are all influenced by it. Therefore, it is essential

that when the disciplinary committee dismisses a charge against an inmate or rules in his favor, the violation report should be removed from the inmate's file.

At present, most states place a copy of a violation report in the inmate's file regardless of the outcome of the case. Even when a notation is made that the case has been dismissed or the inmate has been found innocent by the board, these reports come to the attention of anyone subsequently reviewing the file. There can be no adequate assurance that the prior charges do not influence the decision-making process.

Eleven states, including Arizona, Michigan, Oregon and Utah, recognize this danger and now prohibit any mention of a report being placed in the inmate's file if charges are subsequently dropped. This procedure is similar to expunging arrest records of people who are subsequently acquitted of charges or who have their cases dismissed.

IV. CONCLUSIONS AND IMPLICATIONS

A variegated and contradictory picture emerges from the data presented above. On the one hand, there is the numerical side of the prison disciplinary process. Half of the procedures which prisoners want applied to the disciplinary process (and to which their lawyers and many courts believe they are entitled) are in effect in 90% of the state's whose practices were ascertainable. Only three practices are not in force in at least half of the states. We sought to identify 1100 discrete bits of information about prison discipline systems. Fully 2/3rds of the possible answers were in the affirmative--the procedure is available. By the numbers then, inmates facing charges arising out of prison misconduct are granted substantial procedural safeguards before, during, and after the determination of responsibility.

But the numbers only reveal part of the picture. They do not disclose that the procedures which are least often available include those which may have the most value to the accused. Nor do they disclose some of the limitations which apply to the procedures which are most frequently available.

An understanding of these qualifications is essential to keeping the numbers from becoming an obscuring veil.

Perhaps the pre-eminent qualification is that the shape of the disciplinary system is shifting. The procedures which the states presently employ are subject to continuing change. The direction of movement at present is toward more procedural safeguards. Many factors, including judicial decisions and the recommendations of national study groups, contribute to this flow. But, except in those relatively few jurisdictions where a statute or court order commands a certain practice, inmates may in no sense be said to have a right to the safeguards they are now afforded. Corrections departments even shy away from the word "right," in favor of "privilege." It would appear to be essential to find and fix at least the rationale for determining the irreducible minimum procedures.

This inclination to maintain and exercise complete control appears to be in derogation of the case law which holds that right-privilege labelling is not dispositive of whether procedural safeguards should or should not apply to administrative determinations. The modern view is to begin analyzing these problems with a measurement of the impact on the individual. If that impact is so substantial as to constitute "grievous loss", procedural protections appropriate to the circumstances are required under the Due Process Clause. In our view, the graver sanctions available to the prison authorities do cross the "grievous loss" threshold. In particular, the loss of good time and confinement in punitive segregation have that quality. The loss of good time directly delays a prisoner's return to liberty. Segregation

is grave because in the severely limited freedom of a prison, each further restriction is magnified in its impact on the individual.

The purpose to the safeguards which become applicable is not the prevention of the loss which the individual faces. It is simply to assure that the loss is imposed only in appropriate circumstances. Leaving aside for advocates the question whether any but the least restrictive alternative sanction should be imposed, no loss should be inflicted on one who did not break the rules.

All states use a variety of techniques for bringing out the facts surrounding alleged misconduct. In every state the inmate may give his version of an incident, so the decision-maker will have facts available to him in addition to the misconduct report or other document which initiated the process. But the decision-maker--typically a three member board--must be disposed to consider everything which is available.

The Harvard Center for Criminal Justice initiated a seminal study of the actual workings of in-prison disciplinary hearings in 1970. The Rhode Island Adult Correctional Institution (ACI) was the study's subject. See Harvard Center for Criminal Justice, Judicial Intervention in Prison Discipline, 63 J. Crim. L. Crim. & P.S. 200 (1972). They found that the supposedly impartial disciplinary board composed of ACI employees often made decisions "on the basis of the personal and usually inarticulated feelings of a staff member, rather than on facts presented at the hearing." Id, 210. They concluded that a "back up your officers, whether they are right or wrong" attitude may have pervaded the Board. Id. No later research at the ACI, or elsewhere, has disputed the apparent conclusion that impartiality is an unattainable objective of the staff board. The materials we inspected two years after publication of the Harvard research do not reveal that protective devices have been developed to avoid this problem.

One approach which is obvious, at least to lawyers, is to give the prisoner an advocate who can assist him before the board, to make some record of the proceedings, and to make it necessary for the decision to be based on the facts which are adduced at the hearing. Forty-one different states permit an advocate of some sort (39 authorize only counsel-substitute; 14 permit lawyers.) But there is little specificity in the rules about the role of this individual. The epitome of this can be seen in the fact that 13 states which permit advocates do not permit cross-examination of adverse witnesses. Alternative means of uncovering possibly false, misleading, or biased evidence would appear necessary. But the states rest their faith in their "impartial" hearing body.

Over a third of the states did not indicate whether the disciplinary decision had to conform to the evidence at the hearing, and five more states plainly consider other matters.

An advocate of any stripe would have a hard time making a proper defense in these circumstances. An unaided inmate--and we find him in six of those states--must find his burden impossible indeed.

These findings underscore, dramatically we believe, the urgent need for further, more detailed attention to the disciplinary process, including the indirect as well as the direct implications of various procedures. At this point in time we are on shaky ground indeed with assertions that this procedure or that would be destructive of institutional order or similar complaints which may be raised. In truth we just don't know. Such reactions as have been collected about particular practtices (see, e.g., Appendix B) build no foundation for these claims.

An economic argument is also raised against suggested refinements in disciplinary procedures. "They would cost too much." But we are not told how much more and hence, we cannot fully evaluate alternatives. For example, we don't know what the cost of counsel for disciplinary hearings might be. Would that cost, whatever it might be, produce equal or greater benefit than competing uses for those funds? On a macro-scale, is a fair disciplinary system which is confined to the institutional level, more or less costly (or more or less valuable in correctional terms) than a system which encourages frequent resort to courts to redress alleged errors or injustices of an inadequate administrative mechanism? For that question, too, we have no answer.

If these, and the other objections to effective safeguards for accused inmates are not more substantial than they seem from the evidence and argument thus far put forward in their support, they should be rejected as improper barriers to individual rights.

APPENDIX A - CORRECTIONS DEPARTMENT MATERIALS

Alabama
Handbook of Rules and Information Governing Inmates Committed to Alabama Penal Institutions (Revised 4/73)

Alaska
Manual for Alaska State Adult Correctional Institutions (Revised 8/72)

Arizona
Inmate Reference Manual
Employee Reference Manual
Mail Regulations
Prisoner Rules, Regulations and Disciplinary Program of the Arizona State Prison (July 1973)

Arkansas
Inmate Handbook (Revised 11/72; currently being revised)

California
Rules and Regulations of the Director of Corrections (Revised 1
Rules and Regulations of the Director of Corrections (Jan., 197

Colorado
Dept. of Institutions (Penitentiary Canon City, Colorado)
Inmate Rules and Regulations (June 1973)

Connecticut
Inmate Handbook of Regulations
Handbook of Regulations - Connecticut Correctional Institute Chesire Rules
Rules of CCI, Niantic
Administrative Disciplinary Procedures (9/1/72)

Delaware
Inmate Reference Manual (2/73)
Rules for the Treatment of Inmates in Delaware Correctional Institutions

District of Columbia
Prison Disciplinary Procedures and Code of Prison Offenses (Dec., 1973)

Florida
Inmate Treatment Directive (June 1972)

Georgia
Rules of State Board of Corrections Institutional Operations - Chapter 125-2-5 amended (Oct. 1971)

Hawaii
Rules for the Dept.'s Operations Corrections Division (Revised 1971 - needs further revision)
Administrative Regulations (10/73)

Idaho
Rules and Information for Inmates (7/72)
Administrative Regulations (Revised 2/72)

Illinois
Residents Guide and Rule Book - Pontiac Branch
Administrative Regulations - sec. 804
Employee's Handbook - Pontiac Branch

Indiana
The Inmate Handbook - Indiana State Prison (Oct., 1973)
The Inside Story - Indiana Reformatory

Iowa
Resident Information Guide at the Men's Reformatory - Anamora, Iowa (also applicable at Ft. Madison), (January, 1973)
Policy and Procedure Guidelines: Disciplinary Procedure for all Correctional Institutions (6/73)

Kansas
Policy, Guidelines and Inmate Disciplinary Procedures (8/1/72)
Rules and Regulations of the Director of Penal Institutions (July, 1968)

Kentucky
Administrative Regulations
Resident Guidelines - Kentucky State Penitentiary Eddyville (1973)
Resident Guidebook - Kentucky State Reformatory

Louisiana
General Rules and Regulations - Louisiana Correctional and Industrial School; DeQuincy, Louisiana
Inmate Rules and Rwgulations - Louisiana State Penitentiary Unit of the Dept. of Corrections; Angola, Louisiana (January, 1973)
Inmate Rules and Regulations Department of Corrections (9/71)

Maine
Maine State Prison Officers Rules and Regulations (11/72)
Maine State Prison Rules and Regulations

Maryland
A General Rules of Conduct Handbook for Inmates - Hagerstown (January, 1973)
A General Information and Guidance Manual for Inmates (June, 1973).
Maryland House of Corrections - Jessup (1972)

Massachusetts
Massachusetts Correctional Institute - Pre-Release Center Boston
Administrative Regulations Regarding Disciplinary hearing (June 5, 1972)

Michigan
State Prison of Southern Michigan (Oct., 1971)
State House of Correction and Pranch Prison - Marquette (July, 1972)
Michigan Training Unit - Iona (January, 1973)
Corrections Camp Program - Grass Lake (May, 1973)
Michigan Reformatory (Nov., 1972)

Minnesota
Minnesota State Prison and State Reformatory for Men - Inmate Disciplinary Plan (Oct., 1973)
Inmate Handbook (Feb., 1972)
Agreement System - Disciplinary Unit (Jan., 1974)

Mississippi
Administrative Regulations -(November 30, 1973)

Missouri
Missouri State Penitentiary Inmate Informational Pamphlet (Apr.
Treatment Handbook - Missouri Training Center for Men, Moberly (Jan., 1971)
Personnel Informational Pamphlet (April, 1971)

Montana
Policy and Procedure Memo No. 7 (Oct. 13, 1972)

Nebraska
Administrative Regulations (Oct., 1973)
Regulations and Policies Nebraska Penal and Correctional Complex (3/73)
Guidance Manual Nebraska Penal Correctional Complex (3/73)

Nevada
Rules and Regulations of Nevada State Prison (Revised 11/71; currently being revised)
Rules pursuant to court order issued November, 1972

New Hampshire

New Jersey
Advice to Boys From One Who Knows (Revised 3/73)
Inmate Rule Book - New Jersey State Prison (March, 1973)
Handbook of Information for New Men - Youth Correctional Institute, Bordentown (June, 1972)
Administrative Regulations (1/72)

New Mexico
Dept. of Corrections for the New Mexico Penitentiary: Procedures, Rules and Regulations of the Classification, Adjustment, Segregation and Grievance Committee (Dec. 14, 1972)

New York
Administrative Rules and Regulations, chapters five and six.
Inmate Rule Guide - Attica (Revised 8/73)
Rules of the Manhattan House of Detention for Men

North Carolina
Department of Regulations, Article Four, Secs. 2-401 to 2-410 (June 1, 1972)

North Dakota

Ohio
Handbook of Information and Regulations - Chillicothe Correction Intitute
Administrative Regulations

klahoma
Manual for the Guidance of Inmates
Policy Statement: Disciplinary Procedures (Aug., 1972)

regon
Administrative Rules (Nov. 11, 1973)

ennsylvania
State Regional Correctional Facility at Greenburg (June, 1973)

hode Island
Regulations - Adult Correctional Institutions (Manual being compiled)

outh Carolina
Inmade Guide (revised 1972)

outh Dakota

ennessee
Department of Corrections, Disciplinary Procedures (Oct., 1973)
Rules for Inmates

exas
Rules and Regulations (7/9/73) with amendments (Nov. 12, 1973, Jan. 14, 1974)

tah
Utah State Prison Rules and Regulations
Disciplinary Procedures (Dec. 15, 1973)

ermont
Inmate Guidebook
State Statute pertaining to disciplinary hearings (28 V.S.A. 852) and Administrative Regulations for Disciplinary Hearings (Dec. 1, 1973)

irginia
Rules and Regulations for Inmate Discipline and Classification (April, 1973)
Division Guidelines for Correctional Personnel (June 1, 1973)

ashington
Disciplinary Procedures (May 1, 1973) per consent order

est Virginia
Rules and Regulations - West Virginia State Penitentiary

isconsin
Rules and Information Handbook - Wisconsin State Prison, Waupun (Sept. 1972)
Handbook of Information and Regulations - Wisconsin State Reformatory (Nov., 1972)
Wisconsin Division of Corrections Manual of Adult Institution Procedures (Rev. Oct., 1967)
Disciplinary Procedings Manual (Dec., 1972)

Wyoming

Inmate Rules and Regulations - Wyoming State Penitentiary (July, 1970)

Rules and Regulations for Employees (Oct., 1967)

United States

Bureau of Prisons - Policy Statement. Subject: Inmate Discipline. R. Gerard, Instiutional Services (6/6/72, 12/19/72 and 5/8/73)

APPENDIX B - EXCERPT FROM SUPPLEMENTAL BRIEF
AND APPENDIX FOR RESPONDENT - AVANT v. CLIFFORD

"RECAPITULATION

"Letters of inquiry were sent to 54 jurisdictions, including the Bureau of Prisons of the United States Department of Justice, the other 49 states, American Samoa, Guam, Puerto Rico and the Virgin Islands. Responses were received from 43 jurisdictions.*

"Replies from eighteen jurisdictions appear to indicate that some form of questioning by the inmate himself of the accusing officer of witnesses may be either permitted or required. Unfortunately, these jurisdictions did not all specifically answer the question whether cross-examination is permitted in "every" case, nor were they all able to isolate the effect of cross-examination per se inasmuch as it was frequently merely one component of a body of disciplinary hearing procedures recently adopted. Nevertheless, the following classifications seem appropriate and accurate since the replies received appear to fall into the seven broad categories indicated: (I) Where confrontation or cross-examination is not permitted or provided; (II) Where questions to a witness may be submitted only by a representative of the accused inmate, but not by the inmate himself; (III) Where questions to a witness may only be submitted to a witness through the Hearing Body Chairman; (IV) Where Cross-examination is discretionary, but not required; (V) Where cross-examination by an inmate is permitted according to whether the penalty is a "grievous" one, and wherein certain of the letter responses expressly defined such "grievous penalties"; (VI) Where cross-examination is permitted only if the inmate requests it; and (VII) Where it appears cross-examination is permitted in every case.

I

"Replies from the following nineteen jurisdictions appear to indicate confrontation and cross-examination are not permitted, or are not expressly provided for: (1) United States Bureau of Prisons; (2) Arkansas; (3) Colorado; (4) Connecticut; (5) Florida; (6) Georgia; (7) Maine**; (8) Michigan; (9) Mississippi; (10) Missouri; (11) Montana; (12) Nebraska; (13) New York; (14) Oklahoma; (15) Oregon; (16) Texas; (17) Utah; (18) West Virginia; and (19) American Samoa.

*The eleven jurisdictions which furnished no information were: Alabama, California, Guam, Indiana, Iowa, Kentucky, Pennsylvania, Puerto Rico, Virgin Islands, Wisconsin and Wyoming.

**Under Maine regulations, confrontation and cross-examination are only permitted in hearings on "offenses", i.e., acts constituting state or federal crimes. As to these hearings, Maine reports there is no present data on the impact of the rule, but that prison administrators have expressed concern about the substantial demands entailed upon staff time and manpower.

II

"Replies from five jurisdictions indicate that only an indirect form of cross-examination is utilized, by permitting questions to a witness to be submitted by a staff representative or counsel of the inmate, but not by the inmate himself: (1) Alaska; (2) Arizona; (3) New Mexico; (4) South Carolina; and (5) Tennessee.

"As to the experiences of these jurisdictions, it has been indicated as follows: (1) Alaska supplied no information on its experiences with its procedures, which are now 15 months old; (2) Arizona reported its rules are too new for it to supply reliable information on their effect; (3) New Mexico, whose procedure merely permits the questioning of a special impartial agent (who is not the inmate's accuser, but one who investigates the facts and interviews both sides), reports its system has worked well for all concerned; (4) South Carolina indicated it felt its procedure, despite its shortcomings, to be the most proper vehicle for disciplinary hearings; (5) Tennessee, which permits questioning by inmate counsel, who represent prisoners at such hearings on a full time basis, reports its experiences on the whole have been good.

III

"In one jurisdiction, Ohio, an inmate may only question his accuser by submitting his questions through the chairman of the hearing board. As to their experience, Ohio reports that although no statistics are available, the greatest problem this has caused is requiring a "great deal of paper work" and having the hearing on one of the accusing officer's regular working days.

IV

"Replies from three states indicated that cross-examination is discretionary by the Hearing Body: (1) In Idaho, it is permitted if material, but only when the accusing officer is present, and the Hearing Body has discretion as to when it shall be allowed; (2) In North Carolina, the committee may summon any witnesses and may permit the accused inmate to question them; (3) In Illinois, the inmate may ask the committee to interview witnesses for him, and if they have relevant information, they will be called to testify, in which event the inmate may question the witnesses, but there is no requirement that the accusing officer always appear, and a significant number of charges are disposed of based on the written records and the inmate's explanation, or on interviews of the accusing officer via telephone during the actual hearing itself.

"The experiences related by the above three states indicate that Idaho is unable to determine the effect of cross-examinati

North Carolina supplied no information on its experiences; and Illinois is unable to supply data on the effect on security, morale, or rehabilitation, although the disciplinary process has not been impeded by the new procedure and many employees are unhappy about the additional demands on their time and energies.

V

"Five states indicated that cross-examination is permitted only where the possible penalty is of a "grievous" nature and actually defined the requisite penalty or grievous loss: (1) In Delaware, only where the penalty may exceed five days confinement or the loss of five days' good time; (2) In Hawaii, where the "grievous loss" with which the prisoner is threatened is placement in solitary confinement for an indefinite period; (3) In Maryland, as to major violations, where the penalty may be confinement more than 15 days and/or loss of more than five days' good behavior time, and if it becomes inflammatory, the Hearing Officer may require cross-examination"through his position"; (4) In Nevada, as to "major infractions" where the penalty may be permanent loss of privileges, confinement in isolation cell, possible loss of good time credits, or referral to the District Attorney; (5) In South Dakota, where the penalty may be a sentence to the Adjustment Center or to the security and isolation area.

"As to the experiences of the above five states, it was indicated: (1) Delaware reports that under their new "Treatment Rules", of which disciplinary hearings are a part, no great change in discipline; as to security they have set aside a housing area for chronic agitators who cannot adjust; they cannot determine the effect on rehabilitation; there has been an increase in manpower hours and overtime; there is an improvement in the quality of the hearings; and there has been no effect on the reporting systems; (2) Hawaii is unable to evaluate the effects of the procedures at this time; (3) Maryland indicates it is difficult to evaluate the effects on discipline, security and rehabilitation; it may result in overtime work by the accusing officer; and the quality of the hearing depends on the control the hearing officer has over the hearing; (4) Nevada indicates no change in inmate attitudes or morale, and inmates still believe the hearings are unfair; no effect on security, inmate rehabilitation or inmate safety; the staff is more aware of procedural safeguards; and the cases have decreased to some extent; (5) South Dakota indicates positive effect on discipline; effects are unknown on security, order and prisoner rehabilitation; effects on fiscal budget and manpower hours are burdensome; no problems on the quality of the hearings; and fewer hearings are now held because guards reportedly do not want to be bothered with the hearing procedure.

VI

"Five states appear to indicate cross-examination by the inmate is permitted where the inmate requests same: (1) Louisiana; (2) Massachusetts; (3) Minnesota; (4) North Dakota; and (5) Rhode Island.

"The experience of these five jurisdictions indicate: (1) Louisiana: No effect on discipline, security or order; impossible to isolate the effect of cross-examination on rehabilitation or quality of the hearings, although their new procedures have improved the chances of rehabilitation and the quality of their hearings; little effect on man-hours or budget since the counsel substitutes, who are inmates, do not abuse the right; (2) Massachusetts: They cannot accurately assess the procedure's effect on inmate discipline, prison security, order, prisoner rehabilitation, or filing of reports; it has created certain inconveniences regarding manpower hours and administration, but not too burdensome; (3) Minnesota: There is greatly varied opinion, but it upgrades the quality of the hearings and relieves inmate frustration; having the officer available for the hearing is very expensive and complicates the hearing scheduling greatly; there has been some small effect on inmate discipline, security and rehabilitation; effects on manpower hours and budget has been "startling", as overtime, summoning of officers from off-duty hours, time spent at hearings and disruption of staff routine and record keeping have increased greatly; quality of hearing has been upgraded; no effect on inmate safety; (5) Rhode Island: No Information supplied.

VII

"Replies from five states appear to indicate that cross-examination is permitted in every case: (1) Kansas; (2) New Hampshire; (3) Vermont; (4) Virginia; and (5) Washington.

"The experience of these jurisdictions indicate as follows: (1) Kansas: Beneficial effect on inmate discipline and quality of the hearings; effect on inmate rehabilitation unknown; some effect on budget and administration; very little effect on reporting system. (2) New Hampshire: After only nine months their experience cannot be meaningfully stated. However, due to starting-up difficulties, which slowed down the disciplinary process and consumed an inordinate amount of time of officers and delayed the imposition of discipline, it is felt these procedures had an adverse effect on discipline, security and order and the efficiency of the prison's administration; (3) Vermont: No apparent effect on discipline and security; the effects on inmate rehabilitation which they hoped for, have not been very successful, and regardless of procedures used, inmates are dissatisfied, increase in manpower hours by new disciplinary regulations, but difficult to determine effect on budget of cross-examination alone; cross-examination was supposed to increase

the quality of the hearings, but they are not sure this has been the case; reporting of cases has decreased to a degree; (4) Virginia: Hearings have caused a favorable result on inmate discipline, although at first discipline and security decreased because of officials' resistence; (5) Washington: Effect on discipline at this point is hard to define but most feel the procedures are more fair, but perhaps unduly technical; the rules will require substantially more money and manpower to properly implement; in general, the quality of the hearings has improved.

CONCLUSION

"It appears from the foregoing materials that a number of jurisdictions have adopted procedures permitting some form of cross-examination by inmates, in at least some disciplinary hearings, without having suffered significant adverse consequences in the operation of the correctional institutions, but these procedures have, for the most past, been adopted quite recently, and, therefore, the currently available data is inconclusive with respect to the consequence of such procedures."

APPENDIX C - ARTICLES DEALING WITH PRISON DISCIPLINARY ADMINISTRATION

This Appendix is excerpted from a comprehensive general bibliography of cases and articles which has been published as a special edition of the Prison Law Reporter.

Articles

Brant, Prison Disciplinary Procedures: Creating Rules, 21 Clev. St. L. Rev. 83 (1972)

Clements and Ferguson, Judicial Responsibility for Prisoners: The Process That is Due, 4 Creighton L. Rev. 47 (1971).

Gallington, Prison Disciplinary Decisions, 60 J. Crim. L., C. & P.S. 152 (1969).

Hollander, The "Adjustment Center": California's Prison within A Prison, 1 Black L. J. 152 (1971)

Jacob, Prison Discipline and Inmate Rights, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 227 (1970).

Kraft, Prison Disciplinary Practices and Procedures: Is Due Process Provided?, 47 N.D.L. Rev. 9 (1970).

Millemann, Due Process Behind the Walls, Prisoners' Rights Sourcebook 79 (1973)

Millemann, Prison Disciplinary Hearings and Procedural Due Process: The Requirements of a Full Administrative Hearing, 31 Md. L. Rev. 27 (1971).

Newman, The Process of Prescribing Due Process, 49 Calif. L. Rev 215 (1961)

Schwartz, Lolleeny, Campana, Harvey, Due Process in Prison Disciplinary Hearings, 29 Guild Prac. 79 (1972)

Schwartz, A Comment on Sostre v. McGinnis, 21 Buff. L. Rev. 775 (1972).

Sirrico, Prisoner Classification and Administrative Decision Making 50 Tex. L. Rev. (1972)

Turner & Daniel, Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime, 21 Buff. L. Rev. 759 (1972).

Vanderet, Procedural Due Process in California Prisons. 48 Cal. Bar. D. 668 (1973).

Warren, Classification of Offenders as an Aid to Efficient Management and Effective Treatment, 62 J. Crim. L., C. & P.S. 239 (1971).

Wick, Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements, 18 S.D.L. Rev. 309 (1973).

Law Review Comments, Notes, Etc.

Note, Procedural Due Process for Intraprison Disciplinary Hearings: An Arkansas Analysis, 27 Ark. L. Rev. 44 (1973).

Note, Judicial Limitations Upon Disciplinary Authority in the Penal Process, 8 Calif. Western L. Rev. 505 (1972).

Punitive Segregation in State Prisons-The Need for Definite Time Limitation. 76 Dick 1. Rev. 125 (1971).

Note, Judicial Intervention in Prison Discipline, 63 J. Crim. L. C. & P. S. 200 (1972).

Note, Administrative Decisions in Prisons: Are Prisoners Entitled to Procedural Due Process 2 Memp. S. L. Rev. 85 (1971).

Note, Due Process Safeguards in Prison Disciplinary Proceedings: The Application of The Goldberg Balancing Test, 49 N.D. L. Rev. 675 (1973).

Note, Civil Rights: Procedural Due Process in Prison Disciplinary Hearings, 26 Okla. L. Rev. 261 (1973).

Note, Prisons---Right to Counsel After Riot, 6 Suff. U.L. Rev. 1189 (1972).

Note, Prisons---Procedural Due Process and Prison Administration 6 Suff. U.L. Rev. 1169 (1972).

Note, Right to Counsel at Prison Disciplinary Hearings, 2 U. Balt. L. Rev. 263 (1973).

Note, Due Process in California Prison Disciplinary Hearings, 5 U.C.D. L. Rev. 384 (1972).

Note, Procedural Due Process in a Prison Disciplinary Proceeding, U. Pa. L. Rev. 844 (1973).

Note, Intra-Penal Disciplinary Proceedings, 1971 U. Tol. L. Rev. 618

Note, Scope of Fourteenth Amendment Due Process: Counsel in Prison Disciplinary Proceedings, 1971 Utah L. Rev. 275

Note, Constitutional Law - Due Process Clause of the Fourteenth Amendment May Require Elementary Procedural Safeguards for Prisoners in Administration of Prison Discipline, 25 Vand. L. Rev. 1079 (1972).

Note, Constitutional Law-Enforcement of Prison Discipline and its Effect Upon the Constitutional Rights of Those Imprisoned, 8 Vill. L. Rev. 379 (1963).

Note, Federal Court Intervention in State Prison Internal Disciplinary Hearings to Guarantee Fourteenth Amendment Procedural Due Process, 17 Wayne L. Rev. 931 (1971).

Note, Administrative Fairness in Corrections, 1969 Wis. L. Rev. 587.

APPENDIX B

SUPREME COURT OF NEW JERSEY

DOCKET NO. 22-73

THOMAS X. AVANT, *et als.*, *Appellants*, v. ROBERT L. CLIFFORD, Commissioner of the New Jersey Department of Institutions and Agencies, *et als.*, *Respondents.*	Civil Action On Appeal to Review Validity of Rules and Regulations of the Department of Institutions and Agencies Regulating the Conduct Privileges and Duties of Inmates in the Correctional System.

SUPPLEMENTAL BRIEF AND APPENDIX FOR RESPONDENTS

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On the Brief

Filed: February 5, 1974

52. WISCONSIN–No Reply.
53. WYOMING–No Reply.

RECAPITULATION

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is permitted if material but only when the accusing officer is present, and the Hearing Body has discretion as to when it shall be allowed; (2) In North Carolina, the Committee may summon any witnesses and may permit the accused inmate to question them; (3) In Illinois, the inmate may ask the committee to interview witnesses for him, and if they have relevant information, they will be called to testify, in which event the inmate may question the witnesses, but there is no requirement that the accusing officer always appear, and a significant number of charges are disposed of based on the written records and the inmate's explanation, or on interviews of the accusing officer via telephone during the actual hearing itself.

The experiences related by the above three states indicate that Idaho is unable to determine the effect of cross-examination; North Carolina supplied no information on its experiences; and Illinois is unable to supply data on the effect on security, morale, or rehabilitation, although the disciplinary process has not been impeded by the new procedure and many employees are unhappy about the additional demands on their time and energies.

V

Five states indicated that cross-examination is permitted only where the possible penalty is of a "grievous" nature and actually defined the requisite penalty or grievous loss: (1) In *Delaware*, only where the penalty may exceed five days confinement or the loss of five days' good time; (2) In *Hawaii*, where the "grievous loss" with which the prisoner is threatened is placement in solitary the Committee may summon any witnesses and may permit the accused inmate to question them; (3) In Illinois, the inmate may ask the committee to interview witnesses for him, and if they have relevant information,

they will be called to testify, in which event the inmate may question the witnesses, but there is no requirement that the accusing officer always appear, and a significant number of charges are disposed of based on the written records and the inmate's explanation, or on interviews of the accusing officer via telephone during the actual hearing itself.

The experiences related by the above three states indicate that Idaho is unable to determine the effect of cross-examination; North Carolina supplied no information on its experiences; and Illinois is unable to supply data on the effect on security, morale, or rehabilitation, although the disciplinary process has not been impeded by the new procedure and many employees are unhappy about the additional demands on their time and energies.

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be a sentence to the Adjustment Center or to the security and isolation area.

As to the experiences of the above five states, it was indicated: (1) *Delaware* reports that under their new "Treatment Rules", of which disciplinary hearings are a part, no great change in discipline; as to security they have set aside a housing area for chronic agitators who cannot adjust; they cannot determine the effect on rehabilitation; there has been an increase in manpower hours and overtime; there is an improvement in the quality of the hearings; and there has been no effect on the reporting systems; (2) *Hawaii* is unable to evaluate the effects of the procedures at this time; (3) *Maryland* indicates it is difficult to evaluate the effects on discipline, security and rehabilitation; it may result in overtime work by the accusing officer; and the quality of the hearings depends on the control the hearing officer has over the hearing; (4) *Nevada* indicates no change in inmate attitudes or morale, and inmates still believe the hearings are unfair; no effect on security, inmate rehabilitation or inmate safety; the staff is more aware of procedural safeguards; and the cases have decreased to some extent; (5) *South Dakota* indicates positive effect on discipline; effects are unknown on security, order and prisoner rehabilitation; effects on fiscal budget and manpower hours are burdensome; no problems on the quality of the hearings; and fewer hearings are now held because guards reportedly do not want to be bothered with the hearing procedure.

VI

Five states appear to indicate cross-examination by the inmate is permitted where the inmate requests same: (1) Louisiana; (2) Massachusetts; (3) Minnesota; (4) North Dakota; and (5) Rhode Island.

The experiences of these five jurisdictions indicate: (1) *Louisiana:* No effect on discipline, security or order; impossible to isolate the effect of cross-examination on rehabilitation or quality of the hearings, although their new procedures have improved the chances of rehabilitation and the quality of their hearings; little effect on man-hours or budget since the counsel substitutes, who are inmates, do not abuse the right; (2) *Massachusetts:* They cannot accurately assess the procedure's effect on inmate discipline, prison security, order, prisoner rehabilitation, or filing of reports; it has created certain inconveniences regarding manpower hours and administration, but not too burdensome; (3) *Minnesota:* There is greatly varied opinion, but it upgrades the quality of the hearings and relieves inmate frustration; having the officer available for the hearing is very expensive and complicates the hearing scheduling greatly; there has been some small effect on reporting practices; (4) *North Dakota:* Good effect on inmate discipline, security and rehabilitation; effects on manpower hours and budget has been "startling", as overtime, summoning of officers from off-duty hours, time spent at hearings and disruption of staff routine and record keeping have increased greatly; quality of hearing has been upgraded; no effect on inmate safety; (5) *Rhode Island:* No information supplied.

VII

Replies from five states appear to indicate that cross-examination is permitted in every case: (1) Kansas; (2) New Hampshire; (3) Vermont; (4) Virginia, and (5) Washington.

The experiences of these jurisdictions indicate as follows: (1) *Kansas*: Beneficial effect on inmate discipline and quality of the hearings; effect on inmate rehabilita-

tion unknown; some effect on budget and administration; very little effect on reporting system. (2) *New Hampshire:* After only nine months their experiences cannot be meaningfully stated. However, due to starting-up difficulties, which slowed down the disciplinary process and consumed an inordinate amount of time of officers and delayed the imposition of discipline, it is felt these procedures had an adverse effect on discipline, security and order and the efficiency of the prison's administration; (3) *Vermont*: No apparent effect on discipline and security; the effects on inmate rehabilitation which they hoped for, have not been very successful, and regardless of procedures used, inmates are dissatisfied, increase in manpower hours by new disciplinary regulations, but difficult to determine effect on budget of cross-examination alone; cross-examination was supposed to increase the qualtiy [sic] of the hearings, but they are not sure this has been the case; reporting of cases has decreased to a degree; (4) *Virginia*: Hearings have caused a favorable result on inmate discipline, although at first discipline and security decreased because of officials' resistence; (5) *Washington*: Effect on discipline at this point is hard to define but most feel the procedures are more fair, but perhaps unduly technical; the rules will require substantially more money and manpower to properly implement; in general, the quality of the hearings has improved.

CONCLUSION

It appears from the foregoing materials that a number of jurisdictions have adopted procedures permitting some form of cross-examination by inmates, in at least some disciplinary hearings, without having suffered significant adverse consequences in the operation of the correctional institutions, but these procedures have, for the most part, been adopted quite recently, and, therefore, the currently available data is inconclusive with respect to the consequences of such procedures.

Respectfully submitted,

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APPENDIX C

ADMINISTRATIVE SEGREGATION

IN

CALIFORNIA'S PRISONS

Alias: The Hole, Lockup, Solitary Confinement
And the Adjustment Center

Report of:

The Assembly Select Committee on
Prison Reform and Rehabilitation

Chairman
Assemblyman Walter Karabian

September 1973

ADMINISTRATIVE SEGREGATION IN CALIFORNIA'S PRISONS ALIAS: THE HOLE, LOCKUP, SOLITARY CONFINEMENT AND THE ADJUSTMENT CENTER

The first adjustment center established by the California Department of Corrections was completed at Folsom State Prison in 1952. This unit was occupied on February 2, 1953. Since the inception of this first adjustment center, the utilization of such units in California's prison system has been the subject of strong criticism by convicts, concerned citizens, and correctional staff.

The development and use of adjustment centers was based on the need to separate those convicts who sought to disrupt or destroy the institution from those convicts who were trying to prepare themselves for the future. Therefore, the adjustment center because a prison within a prison: a maximum physical control unit, segregated from the rest of the institution.

However, the need for segregation of some convicts was not the sole purpose of the adjustment center. As stated in the Rules of the Director of the Department of Corrections, there were two goals of the adjustment centers:

> . . . first, to maintain the security of the institution by removing inmates who cannot function in the general population; second, to discover and effect adequate methods of treatment whereby these inmates can be ultimately restored to the general population, and hence to society.[1]

The treatment aspect of the adjustment center was envisioned by the Department of Corrections as a

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[1] *Director's Rules,* California Department of Corrections, Chapter V, CL/83, February 5, 1970.

far-reaching contribution to penology. In order to successfully treat and prepare those individuals who were housed in an adjustment center for their eventual return to the general population, this program was to provide:

a) A positive, treatment-oriented atmosphere wherein the individual inmate can come to grips with his personality problems.

b) An optimum amount of individual and group counseling, individual and group psychotherapy, both in scheduled sessions and in informal counseling by staff of the Adjustment Center.

c) Professional treatment time should be provided directly to the inmate and in consultive services to the staff. Adjustment Centers should have specialized psychiatric, psychological and social work services.[2]

These conditions were never realized. The Department of Corrections not only stumbled in achieving their objective, but fell flat on their face. The adjustment centers have been recognized for what they are. As stated by Dr. David A. Ward,[3]

> Segregation and isolation units (the 'hole') were merely relabeled 'adjustment centers' with tempo-

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[2] *Director's Rules*, op. cit.

[3] David A. Ward is chairman of the Department of Criminal Justice Studies and professor of sociology at the University of Minnesota. Previously he was assistant director of the California Study of Correctional Effectiveness of the University of California at Los Angeles; he was also consultant to the National Commission on the Causes and Prevention of Violence. With Gene G. Kassebaum and Daniel M. Wilner, Dr. Ward is the author of Prison Treatment and Parole Survival.

rary and long-term residents classified into 'acute' and 'chronic' cases by 'adjustment committees.'[4]

In sipite of the dismal failure of the Department to achieve the goals of the adjustment centers, these lock-up units did isolate violent or violence-prone convicts. Therefore, under the pretence of contributing new methods of penology, additional adjustment centers were constructed. A second unit was opened in July 1953 at the Deuel Vocational Institution near Tracy. In the following years adjustment centers were established at San Quentin State Prison; California Institution for Men, Chino; and at the Correctional Training Facility, Soledad.

Long before the establishment of the adjustment centers, there were units set aside for administrative segregation. These lock-up units attempt

> . . . to provide external controls for those individuals unable to control their own behavior in the general population but are not considered amenable to Adjustment Center programming.[5]

While administrative segregation is designed to remove from the general population, assaultive, aggressive, and predatory convicts, this form of lock-up does not even purport to provide treatment. While the Department of Corrections states that segregation is not intended as a punitive measure,[6] it is difficult to perceive twenty-three hours of lock-up per day in any other terms.

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[4] *Prisoners in America*, edited by Lloyd E. Ohlin (Prentice-Hall, Inc., Englewood Cliffs, N.J., 1973) pg. 187.

[5] *Director's Rules*, op. cit.

[6] Stated in a letter to Assemblyman Walter Karabian, Chairman, Select Committee on Prison Reform and Rehabilitation, from Mr. Raymond K. Procunier, Director, California Department of Corrections, September 14, 1972.

Recognizing the failure of the adjustment centers as a means of returning men who were management problems to the general population, two programs evolved which attempted to fulfill that goal. The adjustment center at the California Institution for Men, Chino, which was opened in September, 1969, became "the first major specialized effort to get long-time adjustment center cases back into the general population."[7]

This program, though apparently quite successful and well received by both the inmates and correctional staff, has been drastically cut back. It now occupies only about one-half the physical plant that it did in 1969.

A second program, called the Maximum Psychiatric Diagnostic Unit, was established at the California Medical Facility, Vacaville in February, 1972. This program was to evaluate long-term lock-up cases for possible mainline placement. However, this unit is currently in danger of developing into another long-term lock-up unit.

Given the need for a unit which can separate violent, assaultive, disruptive men from the general population, the Department of Corrections has developed a system which not only segregates these men, but oppresses and represses them as well. While the Department of Corrections must concern itself with security and the safety of others, it cannot ignore the human needs of the individuals in lockup. Significantly, as noted by the Ohio Citizen's Task Force on Corrections,

> "Treatment-oriented personnel at all levels express concern about the conflict between security and program needs. While we recognize that institutional rules and regulations play a vital role in the correctional process, unnecessary rules, regimenting

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[7] *Ibid.*

minor aspects of daily life, impede the development of individual responsibility. . . . the basic principles of human dignity need to be observed."[8]

I.

SUMMARY OF RECOMMENDATIONS

Recommendation No. 1—Closure of 1-C and B-Section

The Selection Committee on Prison Reform and Rehabilitation recommends that the utilization of 1-C at Folsom State Prison and B-Section at San Quentin State Prison be terminated immediately. Prison officials concurred with this Committee that both of these facilities were inadequate for the decent housing of inmates. Neither unit should ever be used again. New housing units should be constructed immediately to replace these facilities.

Recommendation No. 2—Disciplinary Hearings

Existing procedures to safeguard the prisoners' rights in disciplinary hearings are frequently not followed. In spite of the American Justice system, convicts are often presumed to be guilty, when suspected of new crimes. Therefore, hearings are concerned primarily with punishment rather than determining guilt. The arbitrary, unchecked, and overwhelming power of the Disciplinary and Classification Committees is smothering the right of the prisoner to due process. This Committee urges that the Department of Corrections take corrective action immediately to ensure that the convict is fairly repre-

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[8] *Final Report*, Ohio Citizens' Task Force on Corrections, Columbus, Ohio, 1971, pages C38, C39.

sented before the Disciplinary and Classification Committees. We further recommend that the practice of punishing men, where their guilt has not been proven, be terminated at once.

FILED
APR 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

VS.

ROBERT O. McDONNELL, individually and on behalf of All prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

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No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

VS.

ROBERT O. McDONNELL, individually and on behalf of All prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

This brief is filed with this Court pursuant to the authority found in paragraph 4 of Rule 42 of the Supreme Court Rules.

INTEREST OF THE AMICUS CURIAE

The State of Illinois manages a large penitentiary system. Since the decision in this case may affect prison systems throughout the nation, the State of Illinois has an important interest in advancing argument on behalf of its right to prescribe prison mail practices.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE THAT MAIL FROM LAWYERS TO INMATES BE OPENED AND INSPECTED IN THE PRESENCE OF THE INMATE.

Illinois agrees generally with the arguments advanced by petitioners on the issues before the Court. Specifically, Illinois agrees with the position stated by Nebraska and California with respect to the necessity of opening and inspecting incoming mail which appears to be legal in nature. We part company on the question of the inmate's Constitutional right to be present when this inspection occurs.

The procedure used in Illinois is similar to the procedure which Nebraska would use. For the last two months, as a matter of administrative grace, the Illinois Department of Corrections has been operating with a system in which the inmate is present at the opening of legal mail. The Department does not consider itself constitutionally bound to continue this practice if it proves unworkable. We assume that the inmate's presence is designed as a kind of insurance that the prison mail office goes no further than inspection.

Initially, we do not concede that the *reading* of attorney-inmate mail would be unconstitutional. There is no precedent for holding that the attorney-client privilege is mandated by the United States Constitution. See *Felber* v. *Foote*, 321 F. Supp. 85, 87-88 (D. Conn. 1970) (3 judge court).

It is difficult in light of *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) to argue that the attorney-client privilege

may be implied from some provision of the Constitution. Even if the privilege is implicit in the Constitutional right to assistance of counsel, it would apply only to criminal cases and there would be no prohibition against the reading of mail from attorneys pertaining to civil cases. See *Evans* v. *Moseley,* 455 F. 2d 1084, 1087 (10th Cir. 1972).[1]

Further, the attorney-client privilege applies solely to communications by the client. There is no privilege for communications by the attorney. And the policy underlying the privilege is recognized as weak. See 8 Wigmore, Evidence, pp. 557-58 (3rd Ed. 1940) (p. 554, McNaughton Rev. 1961) McCormick, Evidence, p. 182 (1954). ("it would be hard to maintain that a privilege . . . would facilitate more than it would obstruct the administration of justice"). See *Branzburg* v *Hayes,* 408 U.S. 665, 690 n. 29 (1972).

There is obviously no explicit basis for a constitutional requirement of the inmate's presence at mail inspection. As an administrative technique it raises more problems than it solves.

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1. Some would claim that the civil right of access to courts implies an attorney-client privilege. The problems with this argument are many. It requires two implied rights, i.e. the implied right to an attorney as part of the civil right of access to courts and from that implied right, an implied right to a privilege. The first implied right flies in the face of refusal to extend the constitutional right of counsel to civil cases. Moreover, the right of access to courts is in fact not dependent upon the right to an attorney. See e.g., Haines v. Kerner, 404 U.S. 19 (1972). Finally, even if an attorney is required it does not follow that an attorney-client privilege is a necessary or desirable part of the attorney-client relationship, particularly in civil cases.

First, there will be delays in legal mail delivery since the inmate's presence must be secured in order for his legal mail to be processed. Second, the increase in risk to security may be significant. Third, there is the additional risk that when contraband is discovered in the inmate's presence, he will attempt to seize the contraband. He may become violent if the contraband is confiscated in his presence.

Fourth, as a monitor of prison administrative practice, an inmate is not likely to be effective. A malicious inmate (and convicted felons as a group have a high percentage of malicious persons) will claim anything if he feels he might gain some advantage or if his false claim serves to harass prison officials. An inmate is not an impartial arbiter. And, of course, a malicious prison official may well decide that he does not have much to lose from a swearing contest with an inmate.

In sum, the presence of an inmate at mail inspection will do nothing to insure the end to which it is directed. It will cause delay of mail, increased security problems and generate a large number of swearing contests to occupy the time of federal judges.

Admittedly, an inmate does have a right to communicate with courts handling his litigation and with attorneys working to overturn his conviction without physical obstruction of that communication. Blatant censorship of legal letters without any relationship to the demands of security is a practice not to be countenanced. However, a prison mail regulation which allows unobstructed correspondence on litigation matters between inmates and their appropriate attorneys or the courts, subject only to opening, verification and inspection of the mails by the

prison mail officer alone, is more than sufficient to meet constitutional standards. Both the Illinois and Nebraska correctional systems have legal mail regulations which are adequate to satisfy an inmate's constitutional rights. Therefore, legal grounds do not exist for mounting an effective challenge to these mail regulations in a 42 U.S.C. 1983 action.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that the Judgment below be reversed.

Respectfully submitted,

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No. 79-478

CHARLES WOLFF, JR., *et al.*,

Petitioners,

v.

ROBERT O. McDONNELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF SENATES OF THE DISTRICT OF COLUMBIA, CORRECTIONAL COMPLEX AT LORTON, VIRGINIA AMICI CURIAE

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF INMATES OF THE DISTRICT OF COLUMBIA CORRECTIONAL COMPLEX AT LORTON, VIRGINIA AMICI CURIAE

INTEREST OF THE AMICI CURIAE

Amici curiae are the representatives in class action litigation of the 2,000 inmates of the District of Columbia Department of Corrections' Correctional Complex at Lorton, Virginia. These inmates have an intense interest in the

basic questions concerning prison administration and control raised by this case. In three actions, *Nathaniel Wright, III v. Delbert C. Jackson,* Civil Action No. 73-186-A (E.D. Va. 1973), *Pollard v. Washington,* Civil Action No. 2055-71 (D.D.C. 1971), and *Woodard v. Washington,* Civil Action No. 1659-71 (D.D.C. 1971), Lorton inmates have sought injunctive and declaratory relief against the procedures followed in the disciplinary proceedings at the Complex. In their complaints, plaintiffs asserted that the due process clause of the Fifth Amendment to the United States Constitution requires that they be accorded, *inter alia,* the rights to confront their accusers, to cross-examine witnesses, and to be represented by counsel.

On September 12, 1973, the United States District Court for the Eastern District of Virginia (Judge Albert V. Bryan, Jr., presiding) preliminarily granted substantially all relief requested by the *Wright* plaintiffs, and on December 7, 1973, it initially approved a new "Prison Disciplinary Procedures and Code of Prison Offenses," which it incorporated in the final order on January 11, 1974. These procedures required, *inter alia,* that an inmate called before the Lorton disciplinary board for other than a "petty" rule infraction be informed of and accorded the following procedural rights:

(1) written notice of the charges and the time and place of the hearing,
(2) the right to be personally present before the disciplinary board,
(3) the right to remain silent,

(4) the right to counsel or a lay substitute,[1]
(5) the right to present written evidence,
(6) the right to call witnesses,
(7) the right to know the names of and confront his accusers, including correctional officials and inmate informants, unless the prison officials can show that the disclosure of an inmate informant's name would pose a threat to his safety,
(8) the right to cross-examine all witnesses appearing before the board,
(9) the right to be judged by an impartial panel of persons not engaged in any previous investigation of the charges against the accused,
(10) the right to examine the written record or taped recording of the proceedings,
(11) the right to a written appeal, and
(12) the right to receive a copy of the prison disciplinary procedures and rules, with a clear delineation of the possible punishments for violations thereof.

Judge Bryan's decision has been appealed to the Court of Appeals for the Fourth Circuit, and in light of both this Court's decision to hear the present case and the appeal of the *Wright* decision, the United States District Court for the District of Columbia has stayed the *Pollard*

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[1] The court did not reach the question of appointed counsel, because there has been, at least until the present date, an adequate number of private attorneys who are willing to be retained by prisoners without fee, and because of the availability of law students for the representation of prisoners upon request.

and *Woodard* actions. Hence, amici curiae have a substantial interest in the basic due process questions before this Court. They file this brief with the written consent of the parties, pursuant to Rule 42(1) of the Rules of this Court. Copies of the letters of consent are being filed with the Clerk and are appended to this brief.

ARGUMENT

INTRODUCTION AND SUMMARY

In the *Wright* case the District Court held that the Fifth Amendment requires prison authorities to conform prison disciplinary proceedings to some of the elemental standards of due process of law. The Court ruled in substance that the inmate's interest in the accuracy of the fact-finding process in disciplinary proceedings – an interest that the prison authorities share – could be protected by the erection of procedural safeguards without infringing improperly on the governmental interest in maintaining the security and order of the prison. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Among the procedural incidents of the disciplinary process required by Judge Bryan are the rights to counsel, to confrontation of accusers, and to cross-examination of witnesses. Since these three rights lie at the center of the issues in the present case, the amici curiae in the instant brief will describe the disciplinary procedures at Lorton and will then demonstrate, through some of the evidence considered by Judge Bryan, that granting these procedural rights would serve the interests of both the government and the inmate.

I. MANY OF THE PROCEDURAL RIGHTS DEEMED TO BE IMPRACTICAL BY THE STATE OF NEBRASKA HAVE BEEN INSTITUTED AT LORTON

Deposition testimony taken in both the *Wright* and *Pollard* actions shows that many of the procedural rights guaranteed by this Court in *Morrissey v. Brewer, supra,* and by the Eighth Circuit in this case were, in practice, afforded to Lorton inmates even before Judge Bryan's judgment in *Wright.*

The disciplinary process at Lorton was commenced by a correctional officer writing a disciplinary report concerning his observation of an infraction by an inmate. This disciplinary report was transmitted to the shift supervisor who interviewed the inmate as to the substance of the report after reading the report, including the names of accusers, to the inmate. After conducting an investigation, the shift supervisor could transmit the report to a disciplinary board made up of three employees of the Department of Corrections. At the disciplinary hearing before this board, the inmate could make a statement on his own behalf with the assistance of either counsel or a lay substitute. If the charges were sustained, and the disciplinary board recommended that good time be forfeited or that the inmate be transferred to maximum security, then the recommendation would be transmitted to the Superintendent of the Complex who, in turn, must recommend punishment to the Director of Operations. Ordinarily, although not invariably, the disciplinary board was composed of persons who had taken no part in prior investigation of the charges against the inmate; the inmate would be advised that anything he tells the investigating officer may be used against him; the board would telephone witnesses

outside the inmate's presence; and brief summary minutes of the proceedings would be taken.[2]

However, Lorton rules and regulations did not provide inmates with the following procedural incidents in disciplinary hearings, as a matter of right:

(1) the right to receive a copy of an investigatory report prepared by a correctional official prior to the disciplinary hearing;
(2) the right to receive written notice of the charges;
(3) the right to call witnesses in his behalf; and
(4) the right to cross-examine witnesses.[3]

Lorton officials were unable to explain why these rights could not be afforded inmates,[4] and Judge Bryan apparently believed that these minimal due process guarantees could be instituted without impairing any valid state interests.

II. THE RIGHT TO COUNSEL SHOULD EXTEND TO DISCIPLINARY HEARINGS

As just stated, one of the rights that was recognized at Lorton even without any judicial command was the right

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[2] Deposition of James Edward Swoboda, then Associate Administrator of Operations, on August 22, 1973, in Wright v. Jackson, Civil Action No. 73-186-A (E.D. Va. 1973) [hereinafter, Swoboda deposition] at 19-29, 56-57; deposition of Clarence Larry Swain, then Acting Superintendent of Adult Services, on July 31, 1973, in Pollard v. Washington, Civil Action No. 2055-71 (D.D.C. 1972) [hereinafter, Swain deposition] at 18-24; deposition of Thomas P. Gaydos, then Acting Shift Captain, on July 31, 1973, in Pollard v. Washington, *supra*, [hereinafter, Gaydos deposition] at 26, 32-33.

[3] Swoboda deposition at 27, 38; Swain deposition at 19-20, 23.

[4] Swain deposition at 30-33.

to be represented at a disciplinary hearing by counsel or lay substitute. Experience at Lorton demonstrates that the presence of counsel or a lay substitute serves the interests of both the state and the inmate in the administration of the correctional process. Balancing governmental and inmate interests, due process dictates that the inmate's overwhelming interest in an accurate fact-finding process far outweighs any tenuous interest of prison administrators in punishing inmates summarily, and this is the only interest that is claimed to be advanced by denying counsel to inmates.

A. Nature of the Individual's Interest

Prisoners at Lorton have been deprived of statutory "good time" credit, segregated in maximum security facilities, denied privileges accorded other residents of the inmate population, and denied parole[5] as a result of disciplinary hearings conducted by correctional officials.[6]

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[5] Deposition of Lt. Joseph L. Mastin, shift supervisor, on July 30, 1973, in Pollard v. Washington, *supra*, [hereinafter, Mastin deposition] at 10; Swoboda deposition at 58-62; deposition of Leon L. Keenan, administrator of maximum security, on August 22, 1973, in Wright v. Jackson, *supra*, [hereinafter, Keenan deposition] at 7-15; deposition of Carl Coleman, Chairman of District of Columbia Parole Board, on July 30, 1973, in Pollard v. Washington, *supra*, at 21-24.

[6] For example, Kenneth O. Pollard, named plaintiff in the *Pollard* action, alleges that as a result of prison disciplinary hearings, he was (1) segregated from the general inmate population for a period of seven months and placed in punitive segregation and solitary confinement, during a large portion of which time he was refused vitally needed medical attention; (2) denied the opportunity during that entire period to engage in productive work or to participate in rehabilitative, recreational, or vocational programs; (3)

(continued)

Deposition testimony in *Wright* shows that Lorton inmates may be confined to a "control cell," called the "hole," for indefinite periods of time. While so confined, the inmate may not leave the "hole" or see other inmates, and he cannot work, attend educational classes, or receive reading materials or visitors. Some inmates have been confined to the Complex's Maximum Security Facility for up to five months while being denied the right to work or attend classes.[7]

Clearly, such punishment for disciplinary violations inflicts "grievous loss," *Goldberg v. Kelly, supra,* 397 U.S. 254 (1970); *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972), and gives the inmate a "substantial interest" in the accuracy of the fact-finding process by which such a loss is inflicted. Infliction of such a loss calls for some orderly process. *Morrissey v. Brewer, supra,* at 482.

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[6] (continued) deprived of 100 days of previously earned statutory good time; (4) deprived of 365 days of meritorious good time for which he had been recommended by a prison guard; (5) subjected to an investigation resulting from information supplied by Lorton officials to the United States Attorney for the Eastern District of Virginia upon which an indictment was returned but which in turn was found so insufficient as to compel dismissal of the indictment; and (6) subjected to a determination that he had committed felonious assault on a prison guard, which may jeopardize his opportunity for parole.

[7] Keenan deposition at 7-8, 9, 11, 16.

B. The Governmental Interest

The State of Nebraska implies that the presence of counsel would transform informal hearings into formal adversary proceedings which would (1) slow the response of prison officials in quelling potentially riotous situations, (2) erode the respect of inmates for the authority of prison officials, (3) increase tensions in the prison, and (4) disrupt the rehabilitatory function of disciplinary hearings. These contentions have no merit, as demonstrated by the deposition testimony of Lorton officials.

Since mid-1973, Lorton inmates charged with rule infractions have had the unqualified right to have counsel or a lay substitute present at disciplinary hearings[8] and at no time have correctional officials complained that the presence of counsel has interfered with prison security.

This full-scale legal assistance program resulted principally from the efforts of Mr. John O. Boone, former Superintendent of the Lorton Complex, who in early 1972 issued a proposed order on disciplinary procedures which provided in part:

> "The resident may be represented by counsel, a staff member, another resident, or a law student. The resident shall be represented by counsel if the alleged violation constitutes a crime for which he could be prosecuted, unless he intelligently waived this right."[9]

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[8] Swoboda deposition at 21.

[9] Part VII(B), Plaintiff's Exhibit #6 in deposition of John O. Boone, Superintendent of the Lorton Complex, on January 20, 1972, in Woodard v. Washington, *supra*, [hereinafter Boone deposition] at 35.

Although this order was never formally adopted, it led to negotiations between LAWCOR – an American University Law School sponsored student group – and the Lorton Superintendent of Operations, which resulted in a proposal to allow LAWCOR representation of "all residents charged with rule violations which are considered serious by the Institutional Staff."[10] When asked whether he believed that implementation of the LAWCOR proposal would "be contrary to your interests in maintaining the health, security, and order of the prison," Superintendent Boone stated:

> "A. Let me say that this is a draft which I will eventually have to look at or the superintendent to see if this is what we are going to use as procedures so it could come out differently. But I say generally improved procedures is directly related to the safety and security of the community.
>
> "Q. And just to make sure I am clear then the improvement of procedures will help the security, health and safety and order of the community as you see it.
>
> "A. As I see it, yes."[11]

LAWCOR has represented inmates in more than 300 disciplinary hearings and the program is in full operation today.[12]

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[10] Plaintiff's Exhibit #3, Item 1, Boone deposition at 14.

[11] Boone deposition at 21.

[12] Lt. Gaydos extensively described the prison disciplinary procedure at Lorton and described the LAWCOR program. Gaydos deposition at 17-18.

The foregoing testimony indicates that the right to counsel presents no threat to prison security while both the inmate and the State "have interests in the accurate finding of fact and the informed use of discretion – [the inmate] to insure that his liberty is not [further impinged] and the State to make certain that it is [not] unnecessarily interrupting a successful effort at rehabilitation . . . ." *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973).[13] Both the legal representation program at Lorton and the testimony of Mr. Boone indicate that the presence of counsel at disciplinary hearings will "help the security, health and safety and order of the [prison] community. . . ."[14]

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[13] Indeed, the principal state interest in *Gagnon* which militated against requiring counsel at every probation revocation hearing – a more adversary hearing would be "less attuned to the rehabilitative needs of the individual" – is not prevalent in punitive prison disciplinary hearings. "Decisions regarding the withholding or forfeiture of good time credit generally differ from the parole decision in that they turn solely on the offender's behavior during his period of imprisonment: Good behavior entitles him to early release regardless of anyone's judgment as to his potential for living a law-abiding life in the community. He should therefore have an opportunity to challenge charges of misconduct. Where such charges may lead to a substantial loss of good time and a resultant increase in the actual length of imprisonment, the prisoner should be given reasonable notice of the charges, full opportunity to present evidence and to confront and cross-examine opposing witnesses, and the right to representation by counsel." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967).

[14] Boone deposition at 21.

III. INMATES SHOULD BE ALLOWED TO CONFRONT THEIR ACCUSERS

Although the rights of confrontation and cross-examination are closely related, the right of confrontation in the prison disciplinary context applies most forcefully to the prisoner's right to know the name of his accuser, who is most often the prison guard who prepared the disciplinary report initiating the charge. The right of cross-examination requires that the accused inmate or his retained counsel be given an opportunity to question and probe both his accusers and any other witnesses at the disciplinary hearing.

The State of California in its amicus brief contends that the right to confront one's accusers would have a volatile effect on "internal prison control and stability" since a charged inmate might retaliate against his accuser.[15]

However, Lt. Joseph L. Mastin, shift supervisor at Lorton and chairman at approximately 50 percent of the disciplinary board proceedings, deemphasized this problem by testifying that in interviewing an inmate against whom a disciplinary report has been filed, he "sometimes" read to the inmate the name of the accusing officer. Moreover,

> "Ninety percent of the time the inmate knows who the guy was that wrote him up anyway."[16]

Another shift supervisor, Lt. Thomas P. Gaydos, supported Lt. Mastin's observations. In response to the question, "How frequently is the [disciplinary] process initiated by a fellow inmate, as opposed to a correctional officer?",

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[15] Brief of Evelle J. Younger, Attorney General of the State of California, Amicus Curiae, at 10-11.

[16] Mastin deposition at 5.

Lt. Gaydos stated: "In comparison, it would be very infrequent."[17] In response to a later question as to whether an inmate was apprised at the disciplinary hearing of the name of the reporting officer, Lt. Gaydos stated that "generally he knows who it is, but if he asks, he's told."[18] Finally, Lt. Gaydos agreed with the proposition that "generally" most of the witnesses who are listed on a disciplinary report are other employees of the Department of Corrections.[19]

The foregoing deposition testimony clearly demonstrates that granting inmates the right to confront their accusers will not jeopardize internal prison security since (1) correctional officers, not inmates, most frequently initiate the disciplinary process, (2) the accused usually knows the name of his accuser, and (3) as provided in Judge Bryan's final order in *Wright*, if prison authorities believe that an inmate accuser's safety would be threatened if he were identified, they may deny the accused any opportunity to confront the informant.

IV. INMATES SHOULD BE PERMITTED TO CROSS-EXAMINE WITNESSES

Since "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis v. Alaska*, 42 U.S.L.W. 4295, 4298 (U.S. Feb. 26, 1974); *see Pointer v. Texas*, 380 U.S. 400, 405 (1965), an inmate who cannot cross-examine witnesses remains deprived of the most essential of

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[17] Gaydos deposition at 7, 13-14.

[18] Gaydos deposition at 32.

[19] Gaydos deposition at 58-59.

procedural safeguards accorded the criminally accused. The State of California claims that cross-examination by inmates at disciplinary hearings could erode their respect for the authority of the prison officials who are cross-examined.[20] However, deposition testimony by Lorton officials in the *Pollard*, *Woodward*, and *Wright* cases demonstrates that granting to inmates the opportunity to cross-examine will not jeopardize state interests.

For example, Superintendent Boone testified that he considered valuable the right of an inmate to call witnesses as long as "it does not involve coercion,"[21] and in support of his proposal that "residents shall be permitted to cross-examine the officer who filed the disciplinary report and other witnesses," he testified as follows:

> "The officers will have some fears and all of that. I think it highly desirable, however, because in fact, I think it would be very, very important in the correctional process that the inmate be able to face the person that charges him with the offenses."[22]

In other words, Superintendent Boone recognized that offenders have certain procedural rights not inconsistent with the goal of rehabilitation since a person who receives what he considers to be unfair treatment is likely to become a difficult subject of rehabilitation. The only problems Superintendent Boone was able to envision from according this right were the "administrative problems" of

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[20] Brief of Evelle J. Younger, Attorney General of the State of California, Amicus Curiae, at 10.

[21] Boone deposition at 22.

[22] Boone deposition at 37-38.

overtime pay for officers called from another shift.[23] These "administrative problems" cannot justify the denial of a fundamental procedural right.

CONCLUSION

Insofar as the issues in this case relate to the constitutional requirements of counsel, confrontation, and cross-examination in prison disciplinary proceedings, the judgment below is amply supported by the experience at the Lorton Complex and should be affirmed.

Respectfully submitted,

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April 5, 1974

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[23] Boone deposition at 38.

APPENDIX

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March 25, 1974

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Washington, D. C. 20006

Re: Wolff, et al. v. McDonnell, et al.
73-679

Dear Mr. Weissbrodt:

Consent of petitioners is hereby given to you on behalf of the prisoners you represent in Pollard v. Washington, Civil Action No. 2055-71 in the United States District Court for the District of Columbia to file an amicus curiae brief herein.

Very truly yours,

CLARENCE A. H. MEYER
Attorney General

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March 22, 1974

AIR MAIL

David S. Weissbrodt, Esq.
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Re: Wolff, et al v. McDonnell, et al
73-679

Dear Mr. Weissbrodt:

Your request to file an *amicus curiae* brief in support of the respondent's petition in the above proceeding has been received.

As counsel for respondent, I hereby consent to your filing an *amicus curiae* brief on behalf of prisoners which you have been representing in Pollard v. Washington, Civil Action No. 2055-71 in the United States District Court for the District of Columbia in the United States Supreme Court.

Very truly yours,

DOUGLAS F. DUCHEK

DFDjm

Supreme Court, U. S.
FILED
APR 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

v.

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of the American Bar Association, Amicus Curiae

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CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

v.

ROBERT O. MCDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of the American Bar Association, Amicus Curiae

INTEREST OF AMERICAN BAR ASSOCIATION

The American Bar Association is the national organization representing the American legal profession. In 1973 the A.B.A. had more than 165,000 members, who comprise over one-half of the total number of lawyers in the United States.

The interest of the A.B.A. in the administration of criminal justice is evidenced by its Project on Standards for

Criminal Justice. A special committee on Standards for the Administration of Criminal Justice has been established to provide supervision and coordination of the Project. The Project, which began in 1964, has been devoted to developing the best practices and procedures as standards to govern the administration of criminal justice, including the development of guidlines for law enforcement officers, prosecutors and defense counsel.

In 1970, the A.B.A. established an interdisciplinary Commission on Correctional Facilities and Services to initiate programs and to formulate guidlines in the field of correctional law and practice. Such programs have facilitated improvements, both legal and operational, in state and local systems for reintegrating criminal offenders into society. The Resource Center for Correctional Law and Legal Services, an example of the Commission's activities, has been concerned with the development of legal principles, including those of constitutional dimension, arising from the operation of our correctional programs.

The A.B.A. has a direct commitment to assist in the development of the case law involving constitutional issues arising out of American prisons. Moreover, the A.B.A. has direct interest in cases involving the attorney-client privilege, including application of the privilege to persons in prisons.

The A.B.A. has not taken a position on other issues which are raised in this case. The silence of the A.B.A. on those issues should not necessarily be interpreted as a position in either support of or opposition to them.

SUMMARY OF ARGUMENT

In the view of amicus, the judgment of the court below as regards the mail inspection rule should be affirmed.

Amicus contends that in the case of attorney-prisoner mail, a mail inspection rule, without the requirement of a showing of a real possibility of contraband, unconstitutionally restricts the attorney-client relationship. A prisoner's right to pursue claims against prison officials in a judicial forum is infringed, in violation of the Fifth and Fourteenth Amendments, by a mail inspection rule which permits the defendant prison officials to inspect mail received from the plaintiff's lawyer. Regarding lawyer representation in defending a prisoner against a criminal or disciplinary charge, the mail inspection rule violates the Sixth Amendment right to counsel. As to both categories of representation, such censorship has particularly harmful impact on indigent prisoners in violation of the equal protection clause of the United States Constitution. And such censorship destroys the confidentiality of the attorney-client relationship.

Inspection of Attorney-Client Mail Unconstitutionally Restricts the Attorney-Client Relationship

Courts uniformly recognize that an important constitutional right retained by prisoners is the right of access to the Court. Prison officials may not unreasonably restrict this right. "It is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious." *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir. 1966). Also, see, e.g.,

Johnson v. Avery, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546 (1941); *Gilmore v. Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970), aff'd sub nom *Younger v. Gilmore*, 404 U.S. 14 (1971).

A prisoner's right of access to the Court necessarily includes the right to seek and obtain assistance from an attorney. *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); see *Palmigiano v. Travisono*, 317 F.Supp. 776, 789 (D.R.I. 1970).

When a prisoner, represented by an attorney, seeks to prosecute a claim against prison officials regarding the legality or constitutionality of their policies or practices, the attorney-client relationship cannot be restricted, consistent with the Sixth and Fifth Amendments, by a mail inspection rule which allows prison officials to open attorney-client mail. Such restrictions on the attorney-client relationship are serious enough to raise a *prima facie* violation of due process protected by the Fifth and Fourteenth Amendments.

To allow the prison officials, who may be a named defendant in a prisoner's lawsuit, by means of inspection, to have access to the attorney-prisoner lawsuit preparations manifestly interferes with the right of due process and lower federal Courts have frequently enjoined such practices. E.g., *Rhem v. McGrath*, 326 F.Supp. 681, 691 (S.D.N.Y. 1971); *Marsh v. Moore*, 325 F.2d 392 (D. Mass. 1971); *Palmigiano v. Travisono, supra.*

When a prisoner seeks legal representation to defend a criminal or disciplinary charge, such a restriction on the attorney-client relationship constitutes a violation of the Sixth Amendment right to counsel. *Conklin v. Hancock*,

334 F.Supp. 1119, 1123 (D.N.H. 1971). Lower federal Courts have, in other contexts, held intrusion by means of secret agents, *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953), *cert. denied*, 349 U.S. 930 (1955) or wiretapping, *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), to be a deprivation of the client's constitutional right to counsel. Amicus asserts that instrusion by means of mail inspection, when mail is often the sole or primary means of communication for prisoner-clients, constitutes a denial of the constitutional right to counsel.

Significantly—both as to claims against the institution and as to criminal or disciplinary charges—the inspection of attorney mail is a special restriction on indigent prisoners. As an economic matter, these prisoners must often rely on mail to communicate confidentially with attorneys. Hence such restrictions deny indigent prisoners the equal protection of the law.

Moreover, attorneys have the greatest interest in upholding the protection of confidentiality necessary for adequately representing their clients. The unabridged right to confidential correspondence is essential if the attorney is to receive full disclosure in order to competently represent his client. It asks too much of an attorney to subject his prisoner-client correspondence to indiscriminate openings by prison officials. If such opening is not to gain advantage by prison officials in prisoner litigation, then there must be good reason for it in each case. If there is good reason, requiring a showing of a real possibility of contraband by prison officials is not an unreasonable burden.

The necessity for confidentiality, from the attorney's standpoint and indeed from the standpoint of a rational

criminal justice process, is forcefully set forth in the American Bar Association Project on Standards for Criminal Justice.

> *Standard 3.1 Establishment of Relationship.*
>
> • • •
>
> *Commentary*
>
> a. *Confidentiality.*
>
> Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer.
>
> • • •
>
> It is to encourage candor and full disclosure that the obligation of confidentiality which surrounds the lawyer-client relationship has been enacted.
>
> • • •
>
> American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, The Defense Function, Sec. 3.1, Commentary a. Confidentiality, p. 201 (1970).

The Commentary continues as follows:

> d. *Correspondence between Lawyer and Client—Censorship of Mail.*
>
> It is fundamental that there should be untrammelled communication between client and lawyer.
>
> • • •
>
> [T]he Supreme Court has said that "even in a jail, or perhaps especially there, the relationship which the law has endowed with particularized confidentiality must continue to receive unceasing protection . . . . *Lanza v. New York*, 307 U.S. 139, 143-44 (1962). Censorship of correspondence between prisoners and their lawyers may inhibit communication and impair the relationship, require time-consuming and expensive travel to insure confidentiality, or even serve as a means of preventing legitimate grievances from being brought to light.

• • •

Id., Commentary d., p. 203-04.

For these reasons, the American Bar Association adopted the following *Standard.*

> Standard 3.1(d). Personnel of jails, prisons and custodial institutions should be prohibited by law or administrative regulation from examining or otherwise interfering with any communication or correspondence between a client and his lawyer relating to a legal action arising out of charges or incarceration.

Id., p. 200-01.

The American Bar Association, speaking for the profession, has also treated the lawyer's role vis-a-vis confidential communication in its Code of Professional Responsibility.

> CANON 4 — A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.
>
> *Ethical Considerations*
>
> EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

American Bar Association Code of Professional Responsibility, p. 16 (Martindale-Hubbell, Inc. 1970)

Without confidential correspondence, an attorney cannot provide the representation which the Professional Code of Responsibility requires of him. The prospect of prison officials being able to open any and all attorney mail without a showing of a real possibility of contraband will have a chilling effect on corresponding attorneys. Moreover, confidential attorney-client correspondence encourages the client to seek early assistance and thereby allows the attorney to promptly and expeditiously resolve legal claims.

With respect to indigent prisoners, the bar has long identified the equal protection problems raised by indigency and has taken it upon itself to provide legal services to those in need. Mail inspection necessarily interferes with the carrying out of that obligation.

> CANON 2 — A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.
>
> • • •
>
> EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointment on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvment in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Ac-

cordingly, legal aid offices, lawyer referral services, and other related programs have been developed by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

American Bar Association Code of Professional Responsibility, *supra* at p. 5-6.

CONCLUSION

For the above reasons, the American Bar Association respectfully urges the Court to affirm that portion of the decision of the United States Court of Appeals, Eighth Circuit, which permits opening of incoming mail from an attorney (and in the presence of the prisoner-addressee if marked "Privileged") *only if* manipulation of the envelope, use of fluoroscopes and metal detectors or other alternate means fail to disclose contraband *and* there is a real possibility that contraband is contained in that envelope.

Respectfully submitted,

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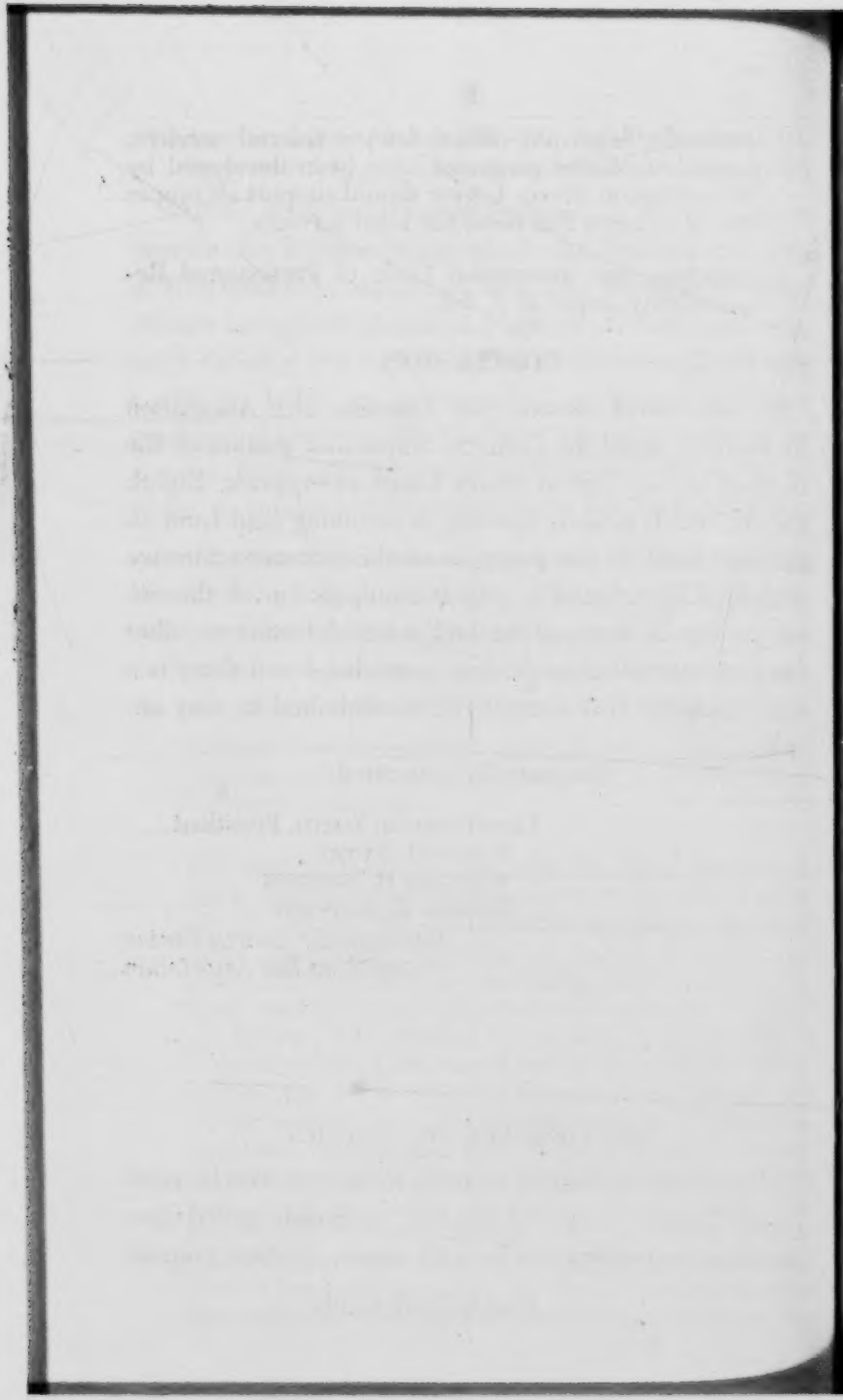
CERTIFICATE OF SERVICE

I CHESTERFIELD SMITH, attorney for amicus, hereby certify that three (3) copies of this brief were duly served upon attorneys for both parties by mail service, postage prepaid.

Chesterfield Smith



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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES L. WOLFF JR., *et al.*,

Petitioners,

—against—

ROBERT O. McDONNELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY AS *AMICUS CURIAE*

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BRIEF OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY AS *AMICUS CURIAE*

The legal issues raised in this appeal and any decision this Court may render in it are of national importance in a period of increased concern over the administration of criminal justice and the rights of inmates in institutions. The issue of due process at disciplinary hearings is at the heart of corrections and treatment of criminals. For these reasons, the National Council on Crime and Delinquency (the "National Council") sought and obtained leave to participate amicus curiae in this case.

The National Council, a nonprofit membership corporation with offices across the United States has a membership of over 60,000 citizens and officials. It was organized in 1907 and incorporated as a national service agency under

the name of The National Probation Association in 1921. The representative nature of the Council is further indicated by the make-up of its officers and Board of Trustees which is annexed as an appendix B for the information of the Court.

With its advisory Council of Judges, other advisory councils and its State Councils, the National Council works on community, statewide and national levels to improve inmates procedural and substantive rights, probation, parole and institutional services and facilities, as well as to stimulate community programs for the prevention, treatment and control of crime and delinquency.

I.

Due Process in Disciplinary Hearings Is an Essential Ingredient in the Reintegration of the Offender Into the Community.

"Due Process," as this court has noted many times, is not a rhetorical talisman; it is the essence of the concepts of fairness of a society. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972). The court below, as other courts, required the implementation of basic due process requirements, in prison disciplinary hearings, *see Morrissey* v. *Brewer,* 408 U.S. 471 (1972), because the United States Constitution requires such protections when a prisoner suffers a "grievous loss." The respondent's brief in this case, as well as some of the amicus briefs, have demonstrated the legal soundness of those views, and those arguments will not be repeated here.

Rather, this amicus brief will seek to explore the meaning and impact which due process protections would have, and have had, upon the prison community, and upon the goals and hopes of prisons for a fairer, more humane prison system.

For over sixty years, the National Council on Crime and Delinquency (NCCD) has sought to bring rationality to the prison system. The fight has been long, and difficult. For this reason, the Council, in 1972, promulgated a MODEL ACT FOR THE PROTECTION OF THE RIGHTS OF PRISONERS, attached to this brief as Appendix A, which set out the bare minimum which was necessary to establish a fair prison system. Because that Act envisioned adoption of all those protections which the court below endorsed, NCCD felt it useful and imperative to file this amicus brief.

A. *By Reducing the "Sense of Injustice" Felt by Most Prisoners, the Provision of Due Process Protections in Disciplinary Hearings Alleviates Prison Tensions and Enhances the Possibility for a Collaborative Institution.*

It is often difficult for attorneys, or courts, whose entire universe revolves around rational decision-making, to fully comprehend the total and arbitrary power which has characterized prison authorities' control over the lives of prisoners. Administrative decisions which drastically affect the lives and liberty of thousands of prisoners have often been made on the flimsiest of information, without review. Guards, poorly trained, and poorly educated, in legal concepts and correctional philosophy have had the power to drastically affect a prisoner's life, with unadulterated, un-

checked power.[1] One guard's determination of one prisoner's guilt of one alleged offense, when translated into a disciplinary charge, can so influence the parole board, that the prisoner may spend many more years in prison, notwithstanding the arbitrariness of the guard's initial decision. In Iowa, this horror is even more direct; there, time spent in solitary confinement not only affects later parole eligibility,—but in addition, by statute, time spent in solitary confinement *does not count as part of the sentence.* Iowa Code Ann. 356.21.

Such unchecked power, even if ratified in a pro forma hearing at which no meaningful guarantees of fairness are provided, can only accentuate the prisoner's general "sense of injustice" which pervades the prison community.[2] See generally, E. CAHN, CONFRONTING INJUSTICE (1962). This, in turn, leads to a heightened frustration, which may ex-

---

[1] "Prisoners often have their privileges revoked, are denied the right of access to counsel, sit in solitary, or maximum security or lose "goodtime" on the basis of a single unreviewed report of a guard. When courts defer to administrative expertise, it is this guard to whom they delegated the final word on reasonable prison practices. This is the central evil in prison . . . the unreviewed administrative discretion granted to the poorly-trained personnel who deal directly with the prisoners." Hirschop and Millemen, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 811, 812 (1969).

[2] Chief Psychologist, at the Federal Correctional Institution, at Terminal Island, California, Dr. Howard Mittman, has said in Punishment and Discipline in Prison, 32 American J. of Corr. 10 (May-June 1970):

> The inmate surely does not perceive our "Adjustment" Committees as helping or rehabilitative agencies. He knows them for what they really are—groups that mete out punishments . . . he believes we are less concerned about his psychological structure than we are about preventing his violation of our rules. He believes we hold these rules paramount, and demand only of him that he submit to them passively.

plode in prison violence at any moment. See Mattick, The Prosaic Sources of Prison Violence, 31 Public Welfare 54 (Fall 1973). It is not surprising, therefore, that many prison riots include, as one of the major demands, more fairness and procedural safeguards in the dispensation of prison discipline. See, e.g., REPORT OF THE NEW YORK STATE SPECIAL COMMISSION (ATTICA (1972)).

Many of those who object to full due process in a disciplinary hearing do so on the basis of a misunderstanding of prison life, or an acceptance of a distorted view, propounded by prison officials, of that life. In *Nolan* v. *Scafati*, 301 F. Supp. 1 (D. Mass. 1969), reversed and remanded 430 F.2d 548 (1st Cir. 1970), for example, Judge Wyzanski rejected a prisoner's argument for fair procedures, including cross examination and the presence of counsel, in disciplinary hearings by declaring:

> Cross-examination of a superintendent, a guard, or a fellow prisoner would almost inevitably go beyond the usual consequences of such probing in a court. It would tend to place the prisoner on a level with the prison official. Such equality is not appropriate in prison. And it is hardly likely that in the prison atmosphere discipline could be effectively maintained after an official has been cross-examined by a prisoner. There are types of authority which do not have as their sole or even principal constituent, rationality. Parents, teachers, army commanders, and above all, prison wardens have the right to depend to a large extent (though not arbitrarily) upon habit, custom, intuition, common sense not reduced to express principles, and other forms of judgment based more on experience than on logic.

Leaving aside the fact that students, soldiers, and even juveniles are now coming to be protected by the due process clause, Judge Wyzanski's statement is fallacious even on its own premise, for it demonstrates a lack of understanding of the actual construct of the prison society. Virtually every study in the last decade or more has agreed that the prison society is not one of two "classes" (guards and prisoners) but, rather, one in which some prisoners are elevated to status because of the need of guards to "accommodate" some parts of the inmate population. Thus, for example, Hans Mattick, a former administrator of the Cook County Jail in Chicago, and now a sociologist at the University of Illinois, has recently observed that:

> In any situation where a relatively small group of men control and direct a much larger group, the controllers depend, in a very real sense, on the passive acquiescence of the controlled. Such passivity is purchased by an effective sharing of power.
>
> Mattick, The Prosaic Sources of Prison Violence, 31 Public Welfare 54, 57 (Fall, 1973).

This "accommodation" is made easier by other ambiguities in the prison's role:

> "(Prison) administrators, finding it difficult to harmonize treatment and custody goals, have tended to generalize policy to such an extent that subordinate staff are relatively free to decide many significant questions of action and procedure."
>
> Lovell and Nelson, Correctional Management and Changing Goals of Corrections in Problems of Criminal Justice Administration 82 (N. Cohen ed. 1969).

See also G. Kassebaum, D. Ward, and D. Wilner, Prison Treatment and Parole Survival: An Empirical Assessment 10 (1971); Cressey, Contradictory Directives in Complex Organizations: The Case of the Prison, 4 Ad. Sci. Q. 1 (1959).

This kind of "accommodation," this sharing of power, is not accomplished evenhandedly—while certain prisoners are "favored," others are dealt with more severely, or left to the whim and caprice of those prisoners with whom power is, for the moment, "shared." See, e.g., Cloward, Social Control in the Prison, in PRISON WITHIN SOCIETY (Hazelrigg, ed. 1968); Sykes, THE SOCIETY OF CAPTIVES (1958). See also, E. GOFFMAN, ASYLUMS (1961).

Just recently, NCCD, echoing the sentiments of many concerned and interested persons, has issued a call for the establishment, in every prison, of meaningful and permanent grievance mechanisms, to deal with prisoner complaints before they explode into riot. NCCD, PEACEFUL RESOLUTION OF PRISON CONFLICT (1973). The study which formed the basis for this call noted that in most prisons in our society today there is an uneasy peace, based primarily upon coercion, accommodation, or "deal-making" between prisoners and their keepers. This fragile relationship stems, essentially, from the refusal of prison administrators, as a group, to acknowledge, even implicitly, the possible equality of position occupied by the remaining prisoners. This system, said the report, "verifies the prisoner's suspicion that he is caught in a game in which his freedom is at stake." *Id.*, at 11.

The profound effect which court decisions requiring due process have had upon this system is made apparent by

the findings in the NCCD report: "As a result of these and other decisions, decision-making procedures in prisons are being formalized. Custodial efficiency based on *sub rosa* power plays and a labyrinth of rules and regulations is far more difficult to achieve than ever before . . ." NCCD, PEACEFUL RESOLUTION OF PRISON CONFLICT 13 (1973). In short, the effect of due process requirements is to make the prison not only more open, but more honest and rational, thus leading to establishing a meaningful relationship between prisoners and prison personnel based not upon intricate maneuvering, but upon fairness and openness.

It is not difficult to discern, therefore, some of the motivating forces behind prison administrators' reluctance to implement truly meaningful due process reforms in such hearings. An "open" prison, where the prisoner is seen, if not as an equal, at least as a human being with some basic human rights, is a threat to the established order—an order based upon the ability of prison administrators to favor some prisoners over others without accountability for their actions. This motivation, and not fear of prison riots—which, as we have suggested, are often sparked by a feeling of indignation heightened by a *lack* of due process and fairness—can account for much the opposition to changes in the "standard operational procedure." Such reasons obviously do not reach constitutional magnitude; but in addition to being bad law, they are poor correctional policy as well, for while they may achieve short-range peace within the prison, they will, eventually, prove self-defeating. For these reasons, then, as well as the constitutional reasons urged in the other briefs supporting the views of the Eighth Circuit, due process in prison disciplinary procedures is necessary and desirable.

B. *By Enhancing the Prisoner's Self-Esteem, by Affording Him Fair Treatment, the Provisions for Due Process Protections in Disciplinary Hearings Become an Affirmative Aid in the Reintegrative Process.*

It is now well-established that retribution is no longer the goal of the correctional process. *Williams* v. *New York*, 337 U.S. 241 (1949). Instead, correctional authorities and courts alike have stressed the need to assure offenders, when released from the prison, can function adequately and acceptably in the larger society. See, e.g., K. MENNINGER, THE CRIME OF PUNISHMENT (1968); American Bar Association, Standards Relating to Sentencing Alternatives and Procedures (1968). This movement culminated in a strong statement by the President's Commission on Law Enforcement and the Administration of Justice:

> A person who receives what he considers unfair treatment from correctional authorities is likely to become a difficult subject for reformation. And the 'collaborative regime' advocated in this volume is one which seeks to maximize the participation of the offender in decisions which concern him, one which seeks to encourage self-respect and independence in preparing offenders for life in the community. It is inconsistent with these goals to treat offenders as if they have no rights, and are subject to the absolute authority of correctional officials.
>
> Task Force Report: Corrections at p. 13 (1967).

The movement toward recognition of the offender as an integral part of the larger community, even while imprisoned, and a desire to aid his adjustment to that community when released, has taken various forms, with some

urging the "rehabilitation" of the prisoner, while others have suggested his "reintegration" into the community even during the incarcerative period.[3] The 1967 President's Commission clearly accepted the latter view, and it is the one endorsed by NCCD as well. See NCCD, PEACEFUL SETTLEMENT OF PRISON CONFLICTS (1973).

Examples of the truly "collaborative" or "reintegrative" ideal model are highly encouraging in this regard. In the early 1960's, for example, an experimental group at the McNeil Island Penitentiary in Washington emphasized the need for all members of the staff, as well as the prisoners and members of the community, to be joined in a closely cooperative effort with commonality of purpose—to return the prisoner to a productive life in the community. Openness and confrontation were encouraged. Not only was reintegration into the community achieved in a large number of cases, but (disciplinary infractions within the prison were greatly reduced). Fr. Francis B. Prange, The Self-Improvement Group at the McNeil Island Penitentiary, 27 Fed. Prob. 34 (March 1963).

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[3] The "treatment"—"rehabilitative" model of prisoner operations, with its focus on the emotional needs of the "sick" prisoner, makes the mistake of attempting to adapt the prisoner to his present environment, the prison, rather than attempting to prepare him for productive life in the external community. The defects of this approach, and the necessity of fostering a climate of open confrontation and responsible decision-making in collaboration with staff and community, has long been recognized. Because of the general perception that the rehabilitation model has failed, a recent study, conducted by NCCD, has found that national commissions and expert bodies have turned to the new model of reintegration, with greater hope of success. NCCD, PEACEFUL RESOLUTION OF PRISON CONFLICT 22 (1973). Both models were designed to alter criminal behavior, but the reintegration model stresses the need to make decisions and to test the alternatives for their effect on the community. The aim is to reduce the stigma attached to criminality and encourage normal behavior.

Another author from the same era reminded us that a prisoner's non-therapeutic contacts with custodial personnel, especially disciplinary contacts, "CAN BE as much a positive factor contributing to a changed outlook as any other beneficial experience." A. Taylor (Lecturer in Psychology, Victoria University of Wellington, New Zealand). *Good Will Attracts Troubled Inmates and Inspires Confidence,* 27 Fed. Prof. 11, 12 (March, 1963) (emphasis added).

One extraordinary experiment in prisoner self-government has illustrated both the difficulty and the advantage of relying on the personal resources of the prisoner as an agent of his own development. Thomas Murton, appointed Superintendent of the Arkansas Penitentiary System in 1967, established wide-ranging prisoner self-government councils throughout his entire system. These groups of prisoners, with the help, but not control, of the Superintendent, dealt with disciplinary problems, prisoner grievances, and classification. Murton's experience was one of virtually unbounded enthusiasm, and led him to conclude that although it was often unpredictable, allowing the prisoner to participate fully and actively in the process of prison management, is the only effective way to maintaining and building the responsibility and self-reliance necessary for reintegration. See Murton, *Inmate Self-Government,* 6 U. San Fran. L. Rev. 87 (1971).

These experiments, and others like them now going on, in Washington State, Massachusetts, and elsewhere, have demonstrated both the efficacy and the viability of the reintegrative concept in prison management. Part of that concept, of course, is affording inmates due process in the institution.

Moreover, one of the basic elements of the reintegration model is the need to change the prisoner's negative perception of his self-worth; his belief that "there is nothing lower than a con."

Many authors have understood the impossibility of reintegration so long as prisoners continue to share that self-perception, a perception all too often encouraged and enhanced whether consciously or unconsciously by prison administrators.[4]

In prison, in which some officials have unchecked power over inmates, causes the powerless inmates to lose all concept of self-worth, and causes the officials to lose the capacity of self-criticism. This is the fundamental barrier to reintegration:

> The basic hurdle is the concept of a prisoner as a nonperson and the jailer as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules and procedures that permit manageable diversity, thereby maximizing the prisoner's freedom, dignity, and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have, as a consequence of their conviction and confinement, claims relating to the maintenance of contact with institutions and individuals in the open com-

[4] See e.g. Harry A. Wilmer (M.D., and Psychiatric consultant to San Quentin Prison and the California Dept. of Corrections) affirming the necessity of open confrontation to encourage the self-respect necessary for rehabilitation: "Thus, everyone in a therapeutic community must be able to face confrontation by others. No one can legitimately hide behind status, hierarchical position . . . (or) . . . power . . ." Good Guys and Bad Guys: A Litmus Paper Concept of Man, 30 Fed. Prob. 8, 12 (Sept. 1966).

munity and claims relating to conditions within the institutions.

Joint Commission on Correctional Manpower and Training, The Legal Challenge to Corrections 65 (1969).

It is conceivable that, if all members of the prison staff were ideally fair-minded, then no procedures would be necessary to protect prisoners' rights and reduce their sense of powerlessness and worthlessness. Inevitably, however, the staff becomes as entrapped by the peculiar caste system of the prison as do the prisoners themselves. See P. Zimbardo, Pathology of Imprisonment, 9 Transaction 4 (April 1972). The fear and suspicion that is embodied in the "inmates' code" thoroughly inhibits any effort to establish the rapport necessary for a normal, healthy society. The tightlipped hostility of the resolve to "do one's own time" is honored by the prisoners and encouraged by the staff. The resulting isolated helplessness makes reintegration difficult if not impossible. The prisoner grows in his conviction that the only way to survive in prison is to cause no trouble and to avoid as much as possible all interaction with the staff except for manipulative interaction.[8] Any cooperation with staff may be interpreted as informing, the cardinal breach of the "convict code."

The traditional role of procedure in an institution is that of safeguard against interested exploitation, abusive short

[8] "The Role of the 'Rat' in Prison," by Harry A. Wilmer, M.D. 20 Federal Probation 44, March 1965. Any effort by custodial staff to use information gathered from informers as a basis for disciplinary actions confirms the prevailing distrust and suspicion. Any positive feelings are immediately dissipated by any reliance of authority on the most hated element of convict life, the informer. More importantly, from the prisoners' viewpoint, even the merest suspicion of such reliance must be completely removed before the process of reintegration can begin.

cuts, and corroding misinterpretation. See the Report on Professional Responsibility of the Joint Conference of the American Bar Association and the American Association of Law Schools (1958). It is designed neither to promote delay nor to foster dissension; rather, it is designed to give full opportunity to be treated fairly and to prevent arbitrary and uncritical use of power. Furthermore, the opportunity for the accused to present as complete an argument as he judges to be possible gives him the sense of having been treated fairly. It is this sense of justice which nourishes self-esteem and diminishes the feeling that "the whole world is against him." The feeling of participation in the administration of justice, and the collaborative effort to do what seems right to all concerned parties, increases not only the sense of self-worth but also respect for the administrators of law and for the law itself:

> Our remedy (for disrespect for the law) will be found in a greater dialogue and a fuller participation in the counsels and decisions of the majority by those who have been and continue to be excluded from the making and implementation of the law. The remedy is in "just laws," democratically designed and sensitively enforced. Lohman, Current Decline in Respect for Law and Order, 31 Fed. Prob. 30 (Dec. 1967) p. 30.

The advocacy of an open institution creating a partnership in rehabilitation involving prisoners, staff, and the outside community received support from the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (1967). In urging the adoption of a collaborative institution, the Commission in no manner rejected the necessity of procedural safe-

guards indeed urging them as an integral part of that vision:

> The necessity of procedural safeguards should not be viewed as antithetical to the treatment concerns of corrections. The existence of procedures both fair in fact and perceived to be fair by offenders is surely consonant with the 'collaborative regime' emphasized as desirable by modern correction, in which staff and offenders are not cast as opponents but are united in a common effort aimed at rehabilitation. In a prison no less than in society as a whole, respect for and cooperation with authority requires the guaranty of fairness. *Id.* at 13.

The collaborative institution is one which emphasizes a cooperative effort to return the prisoner to a normal life in society. The foundation of the effort is a concept of self-worth and independent responsibility. This concept is one which grows in an atmosphere of mutual respect between staff and prisoner, and a healthy regard for institutional goals and practices. In many ways, this framework receives its most severe challenge in disciplinary proceedings. If prisoners lose confidence in the staff in this vital area, it may never be regained. Any suspicion of unfair or autocratic treatment in these sensitive matters will thoroughly undermine all efforts at reintegration into normal society.

In calling for new models and new solutions of conflict situations in prison, NCCD has no naive belief in their panacea effect. Neither due process in disciplinary hearings nor a general atmosphere of fairness in prison will guarantee reintegration; but without these, and other important steps, these important goals cannot be realized.

The NCCD recognizes that in prison administration we are dealing with one of the most difficult areas of life, and one which admits no easy solutions. But it must be admitted that all approaches to solutions which have repressed independent decision-making and a context of open confrontation, have failed utterly. Certainly one of the basis for this failure is the extreme powerlessness of prisoners, individually and collectively, and the feeling of helpless isolation which this actual lack of power engenders. It is our belief that the adoption of full procedural protections in disciplinary hearings will go far to alleviate the feeling of powerlessness. Only then will a first step have been taken on the long journey by community, staff, and prisoner, toward the reintegration of the prisoner into normal community life.

C. *When Full Due Process Protections Are Required at Grievance Hearings, Prison Officials Are Better Able to Understand, and Thus Respond Appropriately, to Prisoner's Sense of Isolation, Frustration and Injustice.*

It is now well-settled that before a "grievous loss" may be inflicted, fundamental due process requires (1) written notice of charges; (2) a hearing; (3) at which the person charged, or about to suffer a "grievous loss," may present evidence; and (4) cross-examine adverse witnesses before (5) an impartial tribunal that (6) will decide on the record, and give a statement of reasons for that decision. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). There is, moreover, strong indication from this court that in proceedings where human liberty or the extent of imprisonment is at stake, the right to counsel applies. E.g., *Gagnon* v. *Scarpelli*, 41 U.S. 778 (1973).

In this action, of course, the prisoner, McDonnell, seeks all of these rights to protect his interest against "grievous

loss." The Council supports this view, since we believe that each of these rights is essential to the collaborative institution and the reintegration of the offender into society. Indeed, we do not perceive the state of Nebraska to argue differently, except with regard to the right of the prisoner to be represented by retained or appointed counsel in such disciplinary hearings. Nevertheless, because each of the due process rights enhances the concept of the reintegration ideal to correctional theory, we think it important to explore these rights in that context.

The presence of counsel (or at least of counsel-substitute) furthers the collaborative prison concept, by structuring the honest confrontation between prisoner and prison administrator concerning roles and behavior in the institution. Challenges to the institutional rules as being too vague ("vicious eyeballing" was an offense in at least one state's prisons until 1971) or unreasonable (in one state, at least, it was a violation of prison rules to sit on a bench in the yard because fifteen years earlier the bench had been painted; when the paint dried, the rule against sitting on it remained) or as discriminatorily enforced are significant, rational challenges to the disciplinary charges brought against an individual prisoner, and should be encouraged, in any institutional setting, as a quest for rationality. Presentation of those challenges, however, needs the assistance of someone whose very liberty and status in the institution is not jeopardized at the very moment of the hearing.

Just as importantly, however, the requirement of counsel will assist the administrator in reevaluating his own institutional role and the methods employed to enforce them. Steeped in a quasi-military tradition, prison administra-

tors, and particularly prison security personnel are rarely encouraged to reassess the rules, or the rationale for the rules, or the methods in which they are enforced. When a prisoner comes before a board comprised of at least one prison security representative, his challenge to the rule will simply not have much persuasive force.[8] Over a period of time, however, as security personnel on the board are confronted again and again, by counsel, to analyze the rules, and the underlying rationale for the rules, they may realize that prisoner complaints and defenses to charges may, in at least some instances, be legitimate. At that point, the collaborative institution takes a great step forward. But, given the nature of prisoner-guard relationships in present institutions, the only meaningful way to both protect the rights of prisoners and move forward toward that goal is to afford the prisoner some articulate spokesman to plead his cause.

It is for this same reason—the possibility that an "outsider" may ask poignant questions which will stir reevaluation that would not occur otherwise—that the requirement of an impartial tribunal, in amicus' view, must include, at the bare minimum, one "outside," non-correctional person. Again, this brief is not aimed at the legal inquiries, although cited in this brief, *infra* p. 16, and in the respondent's brief are numerous cases and authorities for this general proposition. Here, amicus urges a more modest suggestion—that the presence of an objective nonpartisan

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[8] No aspersions, of course, are thrown here on prison guards, etc. The point is that the very rigid hierarchical structure of security personnel makes questioning of rules, and of rule violations, virtually unthinkable; until the collaborative institution is a reality, where security personnel can deal with prisoners on a more human basis, it is unrealistic to expect that they will listen closely to the prisoner's challenge.

on the board will likely result in both prisoners and prison administrators taking a new view of themselves. Indeed, it is this same hope, though in a slightly different context, which has moved NCCD, among many, many others to urge the adoption of grievance mechanisms inside prisons. The need for impartial arbiters cannot be gainsaid. See Burger, *We Refuse to Be Responsible for the People We Imprison*, 1 Student Lawyer 13 (March 1973). Here, as on grievance boards, that need is imperative if we are to make both prisoner and prison official aware of the rationality of each other's views, and spur forward the collaborative institution and the ultimate reintegration of the prisoner into society.

There are a number of sound purposes in requiring a statement of reasons for the decision of any administrative board, or quasi-judicial agency, particularly if liberty or other important rights are involved. Not only does the affected person obtain some insight into the process of decision-making and gain some understanding of the relevant factors that underlie the decision; but as well, the decision-maker becomes more responsive to the needs and viewpoints of those whom he hears. Clearly, these goals would be critical in the collaborative institution, to help in the reintegration process.

In discussing the requirement of reasons for agency action, Professor Kenneth Culp Davis underscores the view that the requirement not only makes agencies accountable to the affected person, but to its own internal operations as well:

> . . . if the facts are in the file, a superior officer has the means of checking the officer's judgment.
>
> K. Davis, Discretionary Justice 105 (1969)

Still other considerations which suggest the desirability of requiring decision-makers to state their reasons have special applicability in the prison setting. In discussing the need for a statement of reasons when parole is denied a prisoner, Robert Dawson recognized that "the necessity for making them requires some reflection (by the board) on the grounds for the decision." Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 Wash. U. L.Q. 243, 302.[7] This statement echoes those of Judge Frank, in elaborating the need for requiring judges to file reasons:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts.
>
> *United States* v. *Forness,* 125 F.2d 928, 942 (2d Cir.), *cert. denied,* 316 U.S. 694 (1942).

See also Frank, *Say It With Music,* 61 Harv. L. Rev. 921 (1948).

Thus, far apart from the benefits which due process, and the requirement of a statement of reasons, may bring to the prisoner, it adds to the understanding and perceptions of the prison administrator. Care in finding facts may, as

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[7] Similarly describing the purpose in requiring a parole board to give reasons for denial of parole: "The need for a statement of reasons . . . insures a responsible and just determination by the agency. . . ." *United States ex rel. Harrison* v. *Pace,* 357 F. Supp. 354 (E.D. Pa. 1973). See, in the same vein, concerning the need for a statement of reasons upon sentencing, Note, *Procedural Due Process at Judicial Sentencing for Felony,* 81 Harv. L. Rev. 821, 843, and American Bar Association, Standards Relating to Appellate Review of Sentences 45-47 (1968).

Judge Frank suggests, lead to a determination that the facts could not have been that way—that the decision simply will not down.[8] This Court, too, must have, from time to time, experienced the same awareness, the same realization that by putting pen to paper, clarifications and illuminations arise which otherwise would have been lost, to the detriment of all. Amicus urges the adoption of due process protections not only for the enlightenment of the prisoner, but for the enlightenment of the prison administrator as well.

II.

The Realization That Due Process in Disciplinary Hearings Will Accomplish Much to Both Abate Prison Tensions and Teach Both Prisoners and Administrators About the Meaning of Fairness Has Moved Many Observers of Prison Life to Urge the Acceptance of Full Due Process in Such Hearings.

Although the argument for due process in prison disciplinary hearings rests on constitutional grounds, which have been thoroughly canvassed in the respondent's main brief, the reasons outlined in prior sections of this brief for incorporating due process have moved many prestigious bodies to support those arguments for non-legal reasons as well.

Thus, for example, the Department of Justice, through its National Advisory Commission on Criminal Justice

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[8] "Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." *United States* v. *Forness,* 125 F.2d 928, 942 (2d Cir.), *cert. denied,* 316 U.S. 694 (1942).

Standards and Goals has urged that all of the procedural protections endorsed by the Eighth Circuit's opinion be applied to every important disciplinary decision. In standard 2.12, the Commission declared:

> Rules governing major violations should provide for a hearing on the alleged violation which should be conducted as follows:
>
> 1. The hearing should be held as quickly as possible, generally not more than 72 hours after the charges are made.
> 2. The hearing should be before an impartial officer or board.
> 3. The offender should be allowed to present evidence or witnesses on his behalf.
> 4. The offender may be allowed to confront and cross examine the witnesses against him.
> 5. The offender should be allowed to select someone, including legal counsel, to assist him at the hearing.
> 6. The hearing officer or board should be required to find substantial evidence of guilt before imposing a sanction.
> 7. The hearing officer or board should be required to render its decision in writing, setting forth its findings as to controverted facts, its conclusions and the sanction imposed.
>
> Report on Corrections, pp. 51-52 (1973).

Similarly, the United States Commission on Civil Rights, in its Minimum Standards of Civil and Human Rights of

Inmates in Correctional Institutions (1973) has called for a hearing, at which the prisoner is present, and is able to call witnesses, employ defense counsel (including counsel-substitute), and obtain written charges of the offenses. In addition, the Commission requires that there be a hearing before either an impartial board or outside referee, and the right of the prisoner to appeal the written decision of the board. These same principles, which parallel closely those endorsed by the Eighth Circuit in this case, have been endorsed by the Roscoe Pound-American Trial Lawyers Conference, *A Program for Prison Reform* (1972).

One forward-looking piece of legislation is the Illinois Unified Corrections Code, Ill. Rev. Stat., ch. 38, §§1000-8-7, 8-8, 6-3, 8-3, which provides for: (1) an impartial hearing body; (2) written notice of charges; (3) personal appearance before the body with the right to address; (4) a right by the hearing body to call other witnesses; (5) a written statement of any guilty finding; (6) review of the decision. Even these, however, are not sufficient to meet the constitutional requirements which have been promulgated by many courts. Nor was the Code itself satisfactory to its main draftsman, Patrick McAnany. In an article written shortly after the adoption of the Code, McAnany noted that the right to present other witnesses should be added to those rights, and further noted that the Administrative Regulations allowed the prisoner to cross-examine any witness called by that body. Of the latter requirement, McAnany notes that "central witnesses like the complaining guard should be made available and should be subject to cross examination" in all cases. McAnany, *Imprisonment under the Illinois Unified Code of Corrections: Due Process, Flexibility and Some Future Doubts,* 49 Chicago-Kent L. Rev. 189, 192-93 (1973).

Perhaps no single aspect of due process is more important in the prison setting, and more difficult of accomplishment, than that the trier of fact be impartial. This requirement, reflected in numerous cases throughout our history, is normally easy to meet, since it is usually judges, or administrators far removed from the "front lines," who ultimately determine the facts. In a prison disciplinary hearing, however, this is almost never attained, and only with immense difficulty, attainable. As Professor Fred Cohen has noted, fairness requires that the accused have "a fair chance to influence the result." This, he says, "can never be the case when institutional personnel sit in judgment one moment and drink coffee with the accusers the next." Cohen, *In Search of a Model Act for Prisoners' Rights,* 1973 Wash. U. L.Q. 621, 636.

Several courts, recognizing this problem, which is created by the facts of most prisons' remoteness from major metropolitan areas, have sought to provide at least some solution. In *Batchelder* v. *Geary,* —— F. Supp. —— (No. C-71-2017, RFP, N.D. Cal., Apr. 16, 1973), the court required that at least one member of any fact-finding disciplinary tribunal be a noncorrectional person, such as a member of the local bar. In *Collins* v. *Hancock,* 354 F. Supp. 1253 (D.N.H. 1973), a member of the parole board was suggested as a viable alternative to a board composed of three institutional officers.

In England, the need for impartial triers of fact finds its epitome—a "Board of Visitors," composed of persons totally outside the correctional system, often lay people, and not necessarily lawyers, hears all important cases of discipline. Recently, one of the members of that board

endorsed virtually all of those processes which we would call "due process," and which the respondent in this case sought, and was afforded, by the Eighth Circuit decision. If that recommendation were not adopted, then he suggested an alternative—all serious "offenses" should be removed from the jurisdiction of the institutional authorities, and placed where it rightly belonged: in the hands of the prosecutor, thereby affording full due process, including a jury trial, in every case. Remarks of Mr. Louis Blom-Cooper, Member, Home Secretary's Advisory Council on the Penal System, at a conference on Due Process and Prison Disciplinary Decisions, Academy for Contemporary Problems, January, 1974.

The statements in petitioner's brief concerning the position of the National Council on Crime and Delinquency in its Model Act for the Protection of Rights of Prisoners totally misunderstands the Council's position. While it is true that we specifically require counsel only in hearings where good time or solitary confinement were possible punishments, it is inaccurate to dismiss all other punishment-situations. As our then-general counsel, Sol Rubin, pointed out, the Model Act "dwell(s) not on procedural due process [but rather] . . . recognition of substantive rights, and that when these rights are violated, prisoners be released." Rubin, *Introduction to Symposium on the Model Act for Protection of the Rights of Prisoners*, 1973 Wash. U. L.Q. 553, 560. Far from lightly dismissing the issue, however, the Council's recommendations, crystallized in section 4 of the Act, should be read together with the fact that good time loss, or solitary confinement, or both, are not only possible sentences in virtually any disciplinary hearing, but, indeed, are the most imposed punishments

in disciplinary hearings.[9] Thus, the Act truly recommends the presence of counsel in every disciplinary hearing.

Moreover, the stress upon the right of the prisoner to counsel should not be read, as apparently petitioner reads it, as an exclusion or disconcern with other procedural protections. As the whole of this brief makes clear, the Council strongly endorses the entire panoply of due process, short of jury trial, in even the most mundane and routine disciplinary actions; not so much because it is a "legal" requirement, but because good corrections, good sense, and fairness to all involved require at least that much effort to afford inmates a fair hearing when punishment is at issue.

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[9] A Study of the Iowa Penitentiary has shown that solitary confinement is at least "a part of the majority of committee disposition, Note, The Problems of Modern Penology: Prison Life and Prisoners' Rights 671, 692 (1967). The same is true of federal prisons, Jacobs, *Prison Discipline and Inmate Rights*, 5 Harv. Civ. Lib.-Civ. Rts. L. Rev. 227, 234, n. 30 (1970). A study of the Florida system found that a loss of good time occurred in more than 50% of each of 10 categories of offenses, including "sleeping on the job" (50%), refusal to work (56%), "unsatisfactory work" (75%) and "insufficient work" (55%), Note, *Prisoners Gain Time: Incentive, Deterrent or Ritual Response?*, 21 U. Fla. L. Rev. 103, 115-116 (1968).

CONCLUSION

For the above reasons, amicus urges this court to affirm the decision of the Eighth Circuit Court of Appeals providing basic due process protections to prisoners.

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Certificate of Service

I, DAVID GILMAN, counsel for amicus, hereby certify that on or before April 6, 1974, three copies of this brief were duly served upon attorneys for both parties by mail service, postage prepaid.

.....

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A Model Act for the Protection of Rights of Prisoners

COMMITTEE ON THE MODEL ACT
FOR THE
NATIONAL COUNCIL ON CRIME AND DELINQUENCY

1972

NATIONAL COUNCIL ON CRIME AND DELINQUENCY

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Foreword

FOR MANY YEARS NCCD has expressed the public's concern over prison disturbances and riots. In the last twenty years our assistance has been requested by various commissions that were established following serious riots. We have participated in surveys conducted by these commissions and have developed legislative as well as administrative responses to the conditions revealed.

Although riots continue to occur—and the abuses to which they are a response still prevail in many places—a new element has been added to prisoner grievances: an assertion both of positive rights and of the right to be protected against abuse. This can be regarded only as a heartening development. The court decisions that have responded to the grievances by granting relief affect the prison system as a whole as well as the individual petitioners. Certainly this mode of seeking redress—through petitions to the court, to administrators, and to legislators—is better than communication by riot.

The Model Act set forth below is an effort to respond positively to the new emphasis in prisoner grievances. It points out that the legislatures thus far have been almost totally unresponsive to prisoner efforts to seek redress in positive ways. At the same time the act is, we hope, a support to courts to which the issue of abuse is presented, and to administrators who can, if they will, avoid both litigation and disturbances by instituting needed reforms, by recognizing that men and women are imprisoned not to be abused—either by other prisoners or by the system—but to be helped. The entire community is better served by treating prisoners humanely than by ultimately releasing persons who are more embittered and callous than when they were committed.

Our thanks go to the distinguished committee that worked with us in producing the Model Act for the Protection of Rights of Prisoners.

—MILTON G. RECTOR
Director, NCCD

Committee for a Model Act for the Protection of Rights of Prisoners

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A Model Act to Provide for Minimum Standards for the Protection of Rights of Prisoners

The Need for a Statute

For many years the National Council on Crime and Delinquency has sponsored and published a number of model acts in the fields it deals with—juvenile courts and juvenile delinquency, and the administration of criminal justice and correctional services. We have had a continuing program of developing such models in response to changing conditions—or perhaps to concepts whose implementation has been too long delayed. Thus the Standard Juvenile Court Act has been issued in six editions, since 1925; the seventh edition is in preparation. The Model Sentencing Act, first published in 1963, is being revised.

Over the years we received many communications from prisoners and from their relatives and friends. Most of them were requests for help: e.g., assistance of counsel, assistance in understanding what had happened and what procedures were to be expected, help in their being considered for parole, and help in obtaining a job so that the prisoner could be released on parole.

Nowadays the communications sent by prisoners (or their attorneys) to us —and to others, including the courts —are of a different order. Especially in the last half-dozen years they have been demanding recognition of the rights of prisoners as persons and citizens (citizenship is not lost upon conviction) and a halt to abuses against them. In the past little attention was paid to prisoner complaints of abuses and violations of their rights. Courts adhered to what a leading article in the *Yale Law Journal* in 1963 called the "hands off doctrine," citing a United States court which said: "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."[1]

The "hands off" doctrine is no longer an inviolate rule. Courts have begun to supervise prison administration to protect prisoners against abuse and to protect their basic rights, the sources of which are specific provisions of the Constitution. Thus the right to practice one's religion in prison has been protected, the most significant cases being those brought by Black Muslims. The cases are significant also in that the prisoners who violated institutional rules regulating the practice of religion and other matters were punished by whipping or solitary confinement or both. The conditions of solitary confinement were often horrendously cruel. In numerous cases, the courts enjoined solitary confinement, sometimes retaining jurisdiction while awaiting compliance by the prison administration with the court-ordered changes. The Eighth Amendment prohibition against cruel and unusual punishment was applied in these cases; a federal court, for example, ruled that any

[1] Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963). The author notes that the phrase "hands-off doctrine" is taken from Fritch, "Civil Rights of Federal Prison Inmates," a document prepared in 1961 for the Federal Bureau of Prisons. The quotation from the court opinion is from Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

whipping of a prisoner was a violation of the Eighth Amendment.

Newer cases deal with a different order of prisoner rights. They apply the spirit of *Coffin v. Reichard*, a federal case which declared that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[2]

Thus censorship, often needless and degrading, as well as burdensome to the institution, has now come under examination. A federal court said recently that prison authorities "possess no power of censorship"; it held that they could not bar *Fortune News*, the newsletter of the Fortune Society, an organization aimed at creating greater public awareness of the prison system. It said:

> Only a compelling state interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights. . . .Censorship is utterly foreign to our way of life; it smacks of dictatorship.[3]

Another court has ruled that "the reading of any outgoing mail from the inmates is . . . in violation of the First Amendment . . . unless pursuant to a duly obtained search warrant." For security reasons it allowed opening of incoming mail, except for mail from attorneys, courts, and public officials.[4]

Generally, however, the courts tend to be cautious about supervision of prisons and, more often than not, reiterate the hands-off doctrine. The breach is widening, but the flow of cases is not gushing.

What the Act Does

To establish the principle of *Coffin v. Reichard*, Section 1 of the Model Act contains language corresponding to that quoted above where the case is referred to.

As an agency concerned with prison reform, we believe that courts concerning themselves with prison abuses are acting properly, not only because they are legally sound in applying the Constitution and in interpreting the nature of imprisonment but also because the abuses of rights are serious. Recent events or disclosures include mass murder of prisoners, widespread self-mutilation in protest against inhuman conditions, and destructive riots. The courts have a responsibility to deal with these conditions, and needed prison reform is occurring as a result of the decisions.

Such action by the courts also supports administrative efforts to correct abuses. Some administrators and wardens have made changes to eliminate abuses without any prodding by courts; but change is difficult, and custodial staff may resist changes that reduce their power. It sometimes also happens that a well-prepared suit and a full hearing may reveal not only abuses but their remedies. Sometimes a prisoner's suit results in a court-supervised conference between complainant and defendant at which agreement on changes is followed by dismissal of the suit.[5] The model statute is intended to encourage administrators to make changes without suit, but where this does not occur, it gives courts the necessary jurisdiction.

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[2] Coffin v. Reichard, 143 F.2d 443, 155 A.L.R. 143 (C.C.A. Ky. 1944).

[3] Fortune Society v. McGinnis, 319 F. Supp. 901 (D.C. So. Dist. N.Y. 1970).

[4] Palmigiano v. Travisono, 317 F. Supp. 776 (1970).

[5] Rhem v. McGrath, U.S.D.C. So. Dist. N.Y., July 30, 1971, 70 Civ. 3962.

Briefly this act states the most onerous abuses occurring in prisons and specifies the courts' powers to deal with them. To those who say that its enactment would further burden the courts, there are two answers:

1. If the abuses exist and the violations of rights are amenable to law, the courts *must* take jurisdiction, just as they do with persons who are not in prison and whose litigation also "burdens the courts."

2. What burdens the courts is not their power to correct an abuse but rather the abuse itself. When the abuses cease or become less heinous, fewer writs will be brought to the courts. But for as long a time as attention is needed, it will be far better to have writs than riots. In 1970 a combination of court decisions and prison riots led the New York legislature to enact a law whose language is somewhat similar to ours:

> No inmate in the care or custody of the department [of correction] shall be subjected to degrading treatment, and no officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self-defense, or to suppress a revolt or insurrection.

The act also goes on to set humane standards for inmates held in confinement in a cell or room apart from other inmates.[6]

Solitary confinement has been the subject of a number of suits, and in many instances prisoners have been ordered released from solitary. In some of these cases the courts have laid down rules that must be followed with respect to conditions in solitary. Solitary confinement has not been declared unconstitutional by any court; nevertheless, it is a destructive experience, probably producing the very opposite of what is intended and surely not rehabilitative. It is justified only where a prisoner requires temporary restraint because of his destructive, irrational pattern at the moment. Section 3 establishes the standards governing its special use.

As already noted, a number of courts have used injunctions and other means of redress.[7] Section 6, which deals with remedies, also authorizes a court to prohibit further commitments to an institution.

Many observers of the relationship between courts and prisons have noted that what the court expects in ordering a commitment—namely, a rehabilitative program—may be quite different from what actually occurs in the institution. Some advocate that, to deal with this discrepancy, judges should be required to visit the institutions to which they commit persons. Though this may well be desirable, it will not of itself provide a remedy. A judge may decide not to commit to a particular institution whose faults he has become familiar with, but other judges will not come to the same conclusion. What Section 6 provides is that where a court makes a finding of a pattern of violation of rights, it may declare the institution "off limits" for further commitments until certain conditions are corrected. Some administrative agencies such as state departments of correction have this power with respect to local jails.

Under some correction acts local jails may also be ordered closed, and Section 6 also gives this power to a court when the necessary findings have been made. Recently a court

[6] N.Y. Laws of 1970, ch. 479.

[7] For a discussion of the development of remedies and the limitations still governing many courts, see Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970), particularly 243 *et seq.*

exercised this power where the conditions were grave; it did not close the institution but allowed it a few months to correct the abuses, meanwhile retaining jurisdiction.

In 1970 the atrocities in the Arkansas prison system led to a decision that the entire system was unconstitutionally operated and could be closed. The prisoners' petition maintained that any confinement in the system was cruel and unusual punishment. The federal district court held:

> As far as the Court is aware, this is the first time that convicts have attacked an entire penitentiary system. . . .The Court sustains the claim that conditions and practices in the Penitentiary System are such that confinement of persons therein amounts to a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

The decision did not order the immediate closing of the institutions; instead the court, retaining jurisdiction, gave the authorities time to eliminate the abuses.[8]

In Philadelphia the Court of Common Pleas found that conditions in the city's Holmesburg Prison were bad enough for the entire institution to be condemned. It ordered the transfer of two prisoners who had filed writs of habeas corpus, and it held jurisdiction for thirty days to enable the prison administration to eliminate the abuses, in default of which it would hear petitions from any prisoners. "Conditions in the prison," it said, "constitute cruel and inhuman punishment."[9]

Another court, in New Mexico, ordered release from the Gallup Detention Center to bring the number of prisoners down to sixty and issued an injunction barring any commitments that would raise the number to more than sixty.[10]

In most instances it is the prisoner's petition to a court that uncovers inhumane treatment. Filing such a petition and presenting sufficient proof face many obstacles. A simpler procedure for prisoner complaints—one that would be more accessible to prisoners and closer to the prison administrator—is established in Section 5, which provides for an autonomous "ombudsman" agency empowered to receive and act on prisoner grievances.[11]

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[8] Holt v. Sarver, 309 F. Supp. 362 (1970), *aff'd* 442 F.2d (8th Cir. 1971).

[9] Bryant v. Hendrick, Philadelphia Court of Common Pleas, Aug. 11, 1970.

[10] Curley v. Gonzales, U.S. Dist. Ct. N. Mex., Feb. 12, 1970.

[11] The ombudsman program is discussed in "Interim Hearing on Desirability of a Correctional Ombudsman," Assembly Interim Committee on Criminal Procedure, California Legislature (1970); Spector, *A Prison Librarian Looks at Writ-Writing*, 56 CALIF. L. REV. 365 (1968). The Maryland statute sets up an equivalent office in its act for an Inmate Grievance Commission (Session Laws of 1971, ch. 210, added as § 204F in art. 41, Md. Ann. Code).

The Center for Correctional Justice reports as follows on the ombudsman programs in Oregon and Alberta, Can.:

> "These two programs appear to have given all citizens (in Alberta) and prisoners (in Oregon) a way to correct individual cases of injustice, inefficiency or oversight. The Ombudsmen have been successful in cutting through bureaucratic red tape and in assuring that prescribed regulations are followed in specific cases. Officials at the Oregon Penitentiary are convinced that the Ombudsman has contributed to a more stable 'atmosphere.' On the other hand, the Ombudsmen seem to have made little progress in changing the general policies and procedures under which government agencies operate. (For example, Oregon prisoners now have some assurance that the written rules concerning disciplinary procedures will be followed; the rules, however, remain unchanged.) This is not surprising in Oregon, where the prison Ombudsman, after sixteen years' experience as a guard, continues to be responsible to the Superintendent and to

Discovery can also be aided by citizen visitors to institutions. The use of prison visiting has been cited by Chief Justice Warren E. Burger, who noted on one occasion that in the Netherlands a team of trained people visit prisons regularly to "flush out the rare case of miscarriage of justice and the larger number of cases in which the prisoner has some valid complaint."[12] Addressing the Association of the Bar of the City of New York, he commented that lawyers also assume responsibility for reform of prisons:

> Where do you begin? The same way you prepare a case. By getting all the facts, visiting the scene if necessary, and then organizing the evidence. In this area most of the facts are available at the prison and from prison authorities. A visit to most prisons will make you a zealot for prison reform. If you will form a fact-finding party of one judge and two or three lawyers you will soon discover that 75-80 per cent of all prisoners are in substandard institutions.

A prison visiting program has been instituted by the Young Lawyers Section of the American Bar Association.[13]

What the Act Does *Not* Attempt to Do

The purposes set forth above, though important, are quite limited. The act does *not* undertake specification of prison treatment programs that are desirable or should be mandatory, which is the purview of the statutes governing a state department of correction and the administration of prisons. Thus NCCD's Standard Act for State Correctional Services lists numerous programs—vocational training, religion, medical services, etc.—that should or must be given by state departments.[14]

These statutes are the proper locale for a direct statement of practices that

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share most of the basic assumptions of correctional personnel. Recently, the Ombudsman has become frustrated by the necessity of acting as a middleman between inmates and staff and by his lack of independent power to change practices that seem unfair. The inmates express faith in the Ombudsman's sincerity but doubt in his ability to do anything more than 'play politics.'

"The Alberta Ombudsman, a former Commissioner of the Canadian Mounted Police, has made a few steps in the direction of challenging accepted practices. Apparently, he has achieved a large public following and favorable press. However, in a recent case where he questioned the operation of powerful real estate cooperatives, he was subjected to questioning by a specially created committee of inquiry, contrary to statute. In addition, the Ombudsman is the only employee in the province of Alberta who has not received a raise in salary since 1967. We have discovered already that this inability to be completely free of political pressures may plague our project as well." —First Quarterly Progress Report, 1971.

12 New York Times, Feb. 7, 1970.

13 "Officers of the American Bar Association's Young Lawyers Section and several members of the Junior Bar of Texas made a series of visits to Texas prisons last week. This visit was part of the Young Lawyers Section's nation-wide prison visitation program, which is intended to help improve correctional services and conditions by drawing public attention to both the positive and negative aspects of prisons.

"Since last November, section members have toured a dozen prisons. In Texas, they visited units of the Texas Department of Corrections as well as local jails and observed conditions and interviewed inmates, guards and prison officials. . . .

"Prison visits to observe conditions and interview inmates make up the first of three major phrases in the program. The second phase consists of offering legal services to the inmates on both criminal and legal matters. Law schools at the University of Washington and the University of Kansas are already assisting prisoners in such programs. The final phase of the program is the development of prison reform legislation at the federal and state levels." 9 CR. L. REPORTER 2121, May 12, 1971.

14 NCCD, Standard Act for State Correctional Services, 1966.

are prohibited (e.g., corporal punishment, forbidden in the Standard Act for State Correctional Services) and practices that must be regulated (e.g., solitary confinement—specifically, the conditions governing its use).

Some of these statutes also have provisions for inspection of institutions and their closure by administrators. The Model Act does not attempt to add to or affect such provisions. Administrators and wardens have the primary obligation to conduct satisfactory institutions, and the statutes should support their power to do so. When they fail, the Model Act is applicable.

Although the Act recognizes suits by prisoners, it does not undertake to detail any procedural requirements, and it does not deal with assistance of counsel to prisoners in preparation of suits. Such assistance is now most unsatisfactory. "Jailhouse lawyers"—inmates with claimed expertise of a kind—are often the only help a prisoner has, and the courts have not yet required any more. Unfortunately, the drafters of model legislation for public defender services have failed to include the obligation to assist prisoners.

In one prisoner's suit a United States Court of Appeals addressed itself to the clogging of the courts by many prisoners' petitions, most of them perhaps without legal merit, so poorly drawn that the time of the courts and others is wasted but nevertheless leaving unanswered the question of whether legal assistance might have disclosed a meritorious claim. The Court said:

> In the last analysis, however, the problem of petitions for collateral review that are frivolous, incoherent, false because copied slavishly from winning patterns, or otherwise lacking real merit, seems likely to plague the courts until a system is established for providing legal counsel to . . . prison inmates on a reasonably broad basis.[18]

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[18] United States v. Simpson, 436 F.2d 182 (D.C. Cir. 1970).

AN ACT
TO PROVIDE FOR MINIMUM STANDARDS FOR THE PROTECTION OF RIGHTS OF PRISONERS

§ 1. Declaration of Purpose and Intent

The provisions of this Act shall be liberally construed to promote the intent of the Legislature as follows:

(a) The central principle underlying all rules, regulations, procedures, and practices relating to persons imprisoned in accordance with law shall be that such persons shall retain all rights of an ordinary citizen, except those expressly or by necessary implication taken by law.

(b) Such rights include but are not necessarily limited to nutritious food in adequate quantities; medical care; provision for an acceptable level of sanitation, ventilation, light, and a generally healthful environment; housing, providing for not less than fifty square feet of floor space in any confined sleeping area; reasonable opportunities for physical exercise and recreational activities; and protection against any physical or psychological abuse or unnecessary indignity.

(c) Persons in control of custodial facilities for prisoners shall be held responsible for maintaining minimum standards and shall make use of every resource available to them to prevent inhumane treatment of prisoners by employees, other prisoners, or any other persons.

(d) Measures shall be instituted and maintained within such facilities to protect against suicide or other self-destructive acts.

(e) All reasonable methods shall be used to protect against the theft or destruction of such personal property of prisoners as may be permitted in the institution.

§ 2. Inhumane Treatment Prohibited

Inhumane treatment includes but is not limited to the following acts or activities and is hereby prohibited:

(a) Striking, whipping, or otherwise imposing physical pain upon a prisoner as a measure of punishment.

(b) Any use of physical force by an employee except that which may be necessary for self-defense, to prevent or

stop assault by one prisoner upon another person, and for prevention of riot or escape.

(c) Sexual or other assaults, by personnel or inmates.

(d) Any punitive or restrictive measure taken by the management or personnel in retaliation for assertion of rights.

(e) Any measure intended to degrade the prisoner, including insults and verbal abuse.

(f) Any discriminatory treatment based upon the prisoner's race, religion, nationality, or political beliefs.

§ 3. ISOLATION IN SOLITARY CONFINEMENT[18]

A prisoner may be placed in solitary confinement—segregation in a special cell or room—only under the following conditions:

(a) During such confinement, the prisoner shall receive daily at least 2,500 calories of food in the normal diet of prisoners not in isolation.

(b) The cell in which the prisoner is confined in solitary shall be at least as large as other cells in the institution and shall be adequately lighted during daylight hours. All of the necessities of civilized existence, such as a toilet, bedding, and water for drinking and washing, shall be provided. Normal room temperatures for comfortable living shall be maintained. If any of these necessities are removed temporarily, such removal shall be only to prevent suicide or self-destructive acts, or damage to the cell and its equipment.

(c) Under no circumstances shall a prisoner confined in solitary be deprived of normal prison clothing except for his own protection. If any such deprivation is temporarily necessary, he shall be provided with body clothing and bedding adequate to protect his health.

(d) A prisoner may not be confined in a solitary cell for punishment, and may be so confined only under conditions of emergency for his own protection or that of personnel or other prisoners. Confinement under such circumstances shall not be continued for longer than is necessary for the emergency. A prisoner's right to communicate with his attorney or the

[18] Singer, *Confining Solitary Confinement: Constitutional Arguments for a "New Penology,"* 56 IOWA L. REV. 1251 (1971).

person or agency provided for in Section 5 to receive complaints shall not be interfered with.

(e) No prisoner shall be kept in a solitary cell for longer than one hour without the approval of the highest ranking officer on duty in the institution at the time.

(f) No prisoner may be kept in a solitary cell for any reason for longer than forty-eight hours without being examined by a medical doctor or other medical personnel under the doctor's direction.

(g) A log in a bound book shall be maintained at or near any solitary cell or cells, and employees in charge of such cell or cells shall be responsible for recording all admissions, releases, visits to the cell, and other events except those of the most routine nature.

§ 4. DISCIPLINARY PROCEDURE

It is the responsibility of any person or persons in charge of the management of an institution for the confinement of prisoners to develop and describe in writing a fair and orderly procedure for processing disciplinary complaints against prisoners and to establish rules, regulations, and procedures to insure the maintenance of a high standard of fairness and equity. The rules shall prescribe offenses and the punishments for them that may be imposed. Any punishment that may affect the sentence or parole eligibility (such as the loss of good-time allowance) shall not be imposed without a hearing at which the prisoner shall have a right to be present and a right to be represented by counsel or some other person of his choice. A permanent record shall be maintained of all disciplinary complaints, the hearings, and the dispositions thereof.

§ 5. GRIEVANCE PROCEDURE

The director of the State Department of Correction (or the equivalent official) shall establish a grievance procedure to which all prisoners confined within the system shall have access. Prisoners shall be entitled to report any grievance, whether or not it charges a violation of this Act, and to mail such communication to the head of the department. The grievance procedure established shall provide for an investiga-

tion (aside from any investigation made by the institution or department) of all alleged grievances by a person or agency outside of the department, and for a written report of findings to be submitted to the department and the prisoner.

§ 6. JUDICIAL RELIEF

A prisoner or group of prisoners[17] alleging abuses in violation of this Act may petition [appropriate court] for relief. The court may afford any of the following remedies:

(a) It may make a finding that the allegations are without merit.

(b) It may issue an injunction, prohibitive or mandatory, or utilize any other appropriate remedy in law or equity.

(c) It may prohibit further commitments to the institution.

(d) If the abuses are found to be extensive and persistent, it may order the institution closed subject to a stay of a reasonable period, not to exceed six months, to permit the responsible authorities to correct the abuses. If the abuses are not corrected to the satisfaction of the court, it may order those prisoners who have a history of serious assaultive behavior to be transferred to another facility, and it may order the discharge of other prisoners.

§ 7. VISITS TO PRISONERS AND INSTITUTIONS

The director of a department responsible for the operation of an institution or a system of institutions for the confinement of prisoners shall establish rules and regulations permitting attorneys of record, relatives, and friends to visit and talk in private with any prisoner in an institution at reasonable times and under reasonable limitations. The institution may be visited at any time by members of the state legislature, judges of the criminal or appellate courts, the attorney general, and the governor.

Any other citizen may make application to visit an institution and talk in private with prisoners if the applicant estab-

[17] On petitions signed by next of friend, see Note, *Habeas Corpus vs. Prison Regulation, a Struggle in Constitutional Theory*, 54 MARQ. L. REV. 50, 54-59 (1971).

lishes a legitimate reason for such visit and if the visit is not inconsistent with the public welfare and the safety and security of the institution. The director may reject any such application if the visit or any aspect thereof would be disruptive to the program of the institution.

If application for a visit is denied, the person may apply to [court of general jurisdiction] for an order directing the head of the institution to permit the visit. Such order shall be granted after notice and hearing if it is found that (a) the person is a representative of a public concern regarding the conditions of the prison, (b) he is not a mere curiosity seeker, and (c) it is not established by the head of the institution that the visit, or any aspect of it, would disrupt the program of the institution.

APPENDIX A

Booklet
A Model Act
for the
Protection of Rights of Prisoners

APPENDIX B

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., ET AL., PETITIONERS

v.

ROBERT O. MCDONNELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether all of the due process requirements applicable to parole and probation revocation proceedings, as enunciated by this Court in *Morrissey* v. *Brewer* and *Gagnon* v. *Scarpelli*, are required in prison disciplinary proceedings.

2. Whether any newly-announced standards should be given retroactive application so as to invalidate prior prison disciplinary proceedings.

3. Whether the court below properly held that prison officials are barred from opening incoming mail from attorneys to inspect for contraband.

INTEREST OF THE UNITED STATES

This case presents questions as to whether particular procedures and practices concerning the custody and discipline of prison inmates are required as a matter of due process of law. Although the case involves directly only the practices in prisons in a single state, the Court's decision on the constitutional issues raised is likely to have a direct impact on the existing practices and procedures for management and control of inmates in all other prisons as well, including federal prisons.

The federal prison population represents one-ninth of the Nation's confined offenders; presently it stands at slightly over 23,000 inmates, incarcerated in 49 institutions of various types through the country.[1] During fiscal 1973, the Federal Bureau of Prisons conducted approximately 19,000 misconduct hearings

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[1] The Bureau of Prisons presently operates six maximum security institutions, six intermediate term adult institutions, thirteen short term adult institutions, seven young adult institutions, three juvenile facilities, four institutions for female offenders, nine community treatment centers and one intensive medical treatment facility.

at these institutions. Like many states, the Bureau has established formal procedures for these hearings, and efforts to improve these procedures are ongoing. Resolution of the issues raised in this case may have a substantial impact on the management and control of federal prisoners, and a ruling requiring all prison disciplinary procedures to fit into any particular format or mold may inhibit the continuing development and revision of disciplinary procedures by the Bureau.

STATEMENT

On July 1, 1970, respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, brought a civil rights action under 42 U.S.C. 1983 in the United States District Court for the District of Nebraska. He alleged that disciplinary proceedings in the complex were conducted in violation of procedural and substantive due process; that the inmate legal assistance program did not meet constitutional standards; and that the regulations governing petitioners' mail were unconstitutionally restrictive.

After an evidentiary hearing, the district court granted partial relief, finding, *inter alia*, (1) that the prison's policy of opening and reading all incoming and outgoing mail was improper; (2) that prison authorities were not required to provide inmates with any fixed procedural guarantees at disciplinary hearings as a matter of procedural due process; and (3) that in certain instances good time that had been

taken away from inmates had to be restored because the withholding was not authorized by state law and hence resulted in a denial of substantive due process (Pet. App. 15; 342 F. Supp. 616).

The court of appeals reversed in part and remanded, holding that the procedural due process requirements articulated by this Court in the context of parole and probation revocation proceedings (*Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778)[2] "should be generally followed" with respect to prison disciplinary hearings which may result in the imposition of substantial penalties (Pet. App. 4; 483 F. 2d 1059, 1063). It also directed the district court to determine what requirements were necessary for disciplinary proceedings resulting in serious penalties—other than loss of good time[3]—

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[2] Those procedures are: written notice of the claimed violation; disclosure to the alleged violator of the evidence against him; opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); a neutral and detached hearing body; a written statement by the fact finder as to the evidence relied on and the reasons for revocation; and counsel, on request, where the violator makes a colorable denial of the alleged violation or asserts justification or other mitigating circumstances and the reasons are complex or otherwise difficult to develop. See *Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 786, 790-791.

[3] The court of appeals held that claims relating to loss of good time, affecting as they do the duration of confinement rather than the conditions of confinement, were not cognizable in this civil rights action, under this Court's decision in *Preiser* v. *Rodriguez*, 411 U.S. 475. Accordingly, it held that

to meet those standards, including the circumstances in which assistance of counsel might be required (Pet. App. 6; 483 F. 2d at 1064). The court of appeals further concluded that in those instances where past disciplinary hearings had not been held in compliance with these new requirements, determinations of misconduct must be expunged from the record (Pet. App. 7; 483 F. 2d at 1064). Finally, the court affirmed that portion of the district court's order striking down the prison regulation which called for the opening and reading of mail to and from attorneys (Pet. App. 13; 483 F. 2d at 1066-1067).

SUMMARY OF ARGUMENT

1. The petition presents the question whether the court of appeals properly held that all the procedural requirements for revocation of parole and probation established by this Court's decisions in *Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778, must also be satisfied in prison disciplinary proceedings resulting in segregation or other serious penalties (other than loss of good time credits). We contend that the court of appeals erred in mechanically extending to the unique setting of prison discipline the *Morrissey-Scarpelli* requirements.

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it would be improper for the district court on remand to restore good time that may have been taken from inmates in proceedings that did not meet the requirements of procedural or substantive due process (Pet. App. 6; 483 F. 2d at 1063-1064).

The court of appeals' automatic importation of all of the *Morrissey-Scarpelli* requirements ignores the differences in the circumstances, the governmental interests, and the private interests at stake in the different contexts of prison discipline and revocation of parole or probation—considerations which *Morrissey* holds ought to be taken into account.

Assuming that some process is due in prison disciplinary proceedings, we contend that such process need not be the same as that held due in *Morrissey* and *Scarpelli*, and that the current procedures of the Bureau of Prisons satisfy, if they do not exceed, any constitutionally required minimal procedures in this area. These procedures include written notice of the alleged misconduct; an opportunity to be heard in person; disclosure of evidence, subject to limitations; opportunity to present documentary evidence; hearing by officers not involved in reporting or investigating the misconduct; and written report by the fact-finders stating their conclusions and the evidence relied upon. The Bureau of Prisons believes that omission of certain of the *Morrissey-Scarpelli* requirements that are not reflected fully or unqualifiedly in the current Bureau of Prisons' procedures—the presumptive right to confront and cross-examine adverse witnesses, the related right to full disclosure of all the evidence of misconduct, the unqualified right to call witnesses, and the right to counsel—is justified by substantial reasons reflecting the purposes of prison discipline and the unique setting in which it occurs.

In the first place, the private interest affected by prison discipline is *a fortiori* more limited than the interest affected by revocation of parole or probation. Such discipline does not result in withdrawal of even conditional liberty for a long period of time. For an inmate, such liberty has already been withdrawn, and prison discipline really affects not the prisoner's liberty but rather qualitative factors bearing only marginally—and often only briefly—on the conditions surrounding the prisoner's lack of liberty. Of course, prisoners may have a relatively greater interest at stake in a good time forfeiture proceeding than in a proceeding involving segregation or transfer, just as those forms of discipline may involve a relatively more substantial interest than other sanctions such as loss of privileges or reprimand.

Prisons are closed societies of proven lawbreakers under the constant supervision and control of a limited staff. Widespread hostility and frustration make the atmosphere frequently tense and volatile. Moreover, inmates who break the "inmates' code" by providing information concerning violations risk reprisals if they are identified. Prison authorities believe that testimonial confrontations between an inmate and staff members or other inmates can be dangerous and are to be avoided whenever possible.

The government's interest in prison discipline is not limited to enforcement of the prison rules and maintenance of security. Rather, such discipline is seen as being integrally related to the larger purposes of the institution—rehabilitation of offenders and adjust-

ment of their antisocial tendencies. This relationship calls for substantial flexibility in the disciplinary process, with a wide measure of discretion vested in prison administrators, who are intimately familiar with the inmates and responsible for their rehabilitation and security. Both purposes could be undermined if inmates are free to confront and cross-examine staff members in an adversarial context.

Representation by counsel, moreover, could further interfere with the rehabilitative process by producing undesirable delays in the imposition of sanctions and by shifting the focus of imposition of discipline from rehabilitation to procedural formality.

These features of prison discipline suggest that, if any procedures are constitutionally mandated as a matter of due process, they might be less rigorous for other modes of discipline than for loss of good time, for example, and that, in any event, they ought not to and do not include rights of confrontation and cross-examination of witnesses, or the right to counsel.

The Bureau of Prisons has been engaged in a continuing process of re-evaluation of its procedures, which reflects a concern with assuring fairness and minimizing the likelihood of arbitrary action. This process has resulted in the evolutionary development of increasingly refined procedural requirements for prison discipline, with new procedures being harmonized with the goals of security and rehabilitation. The institution of new procedures ought to be left at this time to prison administrators, rather than being taken over by the courts, as the former are in a far

better position to experiment with new procedures in the unique prison setting. The ongoing process of development of new procedures should be allowed to continue without being constrained by a Procrustean constitutional mandate requiring recognition in all prisons of procedural rights not yet widely proven to be workable in the prison context.

2. If new procedural requirements are to be imposed on the prison disciplinary process, the decision should not be retroactive in effect. Prison officials have heretofore relied in good faith on the absence of an announced constitutional necessity to observe any particular set of rules in imposing discipline. Retroactive application of a decision establishing such requirements could impair the technical validity of an enormous number of disciplinary actions. For example, in the federal prisons alone there were some 19,000 disciplinary proceedings in fiscal 1973, far more than the number of federal probation and parole revocation proceedings. Yet as to the latter type of hearing, this Court made its ruling in *Morrissey* applicable only to future proceedings.

3. Petitioners challenge that part of the court of appeals' decision holding that prison officials could not ordinarily open mail from attorneys, in the inmate's presence and without reading it, in order to inspect for contraband. We contend that such a narrow right to open mail, similar to the procedure followed by Bureau of Prisons, strikes a reasonable and permis-

sible compromise between the institutional need to maintain security and to control material entering the prison, and the prisoner's interest in unrestrained communication with his attorney and access to the courts. The procedures required by the court of appeals to be followed before mail from attorneys may be opened are impractical, unnecessarily burdensome, and significantly ineffective in serving the interests of prison security, and such an inflexible rule ought not be imposed as a matter of constitutional limitation.

ARGUMENT

I. DUE PROCESS DOES NOT REQUIRE THAT THE FULL RANGE OF PROCEDURES DEEMED CONSTITUTIONALLY NECESSARY IN PAROLE AND PROBATION REVOCATION HEARINGS BE PROVIDED IN PRISON DISCIPLINARY PROCEEDINGS.

The Court's decisions in *Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778, established a number of procedural requirements that would thereafter be applicable to proceedings for revocation of probation or parole. Essentially, these requirements were similar in kind, although not coextensive with, many of the basic procedural requirements of criminal trials. Because of the serious consequences to the individual from revocation of parole or probation (often, as a practical matter, fully as serious as the consequences of the original conviction), due process was held to require the specified procedures to assure sufficiently reliable fact-finding

in determining the existence of a violation and establishing the appropriate sanction.

We do not question that it is also desirable to have accurate fact-finding in the context of prison disciplinary proceedings, and that is certainly one of the major objectives of the procedures established by the Bureau of Prisons for the conduct of prison disciplinary proceedings. However, the unique conditions of the prison environment and the nature of the interests served by the disciplinary process in that environment require and justify certain differences in procedures, notwithstanding that there may be a slightly increased risk of factual mistakes in a few cases. Moreover, since the impact of prison discipline on the individual, although not unimportant to him, is almost invariably far less grave than the consequences of a criminal conviction or of revocation of parole or probation, more flexible constitutional standards governing the conduct of disciplinary proceedings may be countenanced, particularly as such flexibility serves substantial governmental interests and needs.

While the record in this case does not reveal all of the variations in procedures followed by different jurisdictions in the conduct of prison disciplinary proceedings, it is quite evident that the full range of the *Morrissey-Scarpelli* requirements are not generally observed. Nevertheless, at least with respect to the procedures followed in federal prisons, we submit that constitutional due process requirements are being fully satisfied. In order to facilitate understanding

of the issue, the following table compares the *Morrissey-Scarpelli* requirements with current procedures of the Bureau of Prisons.

Morrissey-Scarpelli Procedures **	Bureau of Prisons Procedures *	
	Loss of good time ***	Other disciplinary actions
1. Written notice of alleged violation	Written notice of alleged violation	Written notice of alleged violation
2. Disclosure of the evidence against the alleged violator	Presentation or disclosure of all evidence supporting misconduct report heard or seen by Board, except that Chairman may determine that source of certain information should not be revealed if disclosure may endanger safety or well-being of another, the circumstances and reasons for such a determination to be summarized in report	Extent of disclosure of evidence in discretion of Committee
3. Opportunity to be heard in person	Inmate or representative may make opening and closing statements to Board	Inmate given opportunity to answer charges personally to investigating officer and to Committee
4. Opportunity to present witnesses	Available witnesses (staff or inmates) requested by inmate will be called if Chairman determines they are necessary for appreciation of circumstances and if their testimony would not be repetitive, with reasons for not calling noted in record	No right to present witnesses, but Committee may call investigating officer, reporting officer, or other witnesses, in its discretion, and may require further investigation
5. Opportunity to present documentary evidence	Unavailable witnesses may be asked to submit written statements; other documentary evidence will be received	Documentary evidence will be received

Morrissey-Scarpelli Procedures **	Bureau of Prisons Procedures *	
	Loss of good time ***	Other disciplinary actions
6. Right to confront and cross-examine adverse witnesses unless hearing officer finds good cause for not allowing	No right to confront or cross-examine adverse witnesses	No right to confront or cross-examine adverse witnesses
7. Neutral and detached hearing body, such as traditional parole board	Good Time Forfeiture Board (not including officers reporting or investigating the misconduct) makes a recommendation to Chief Executive Officer of institution, whose action is subject to review by Bureau of Prisons' Office of General Counsel at inmate's request	Adjustment Committee shall not include officers reporting or investigating misconduct
8. Written statement by fact-finders as to reasons for revocation	Written recommendation to Chief Executive Officer setting forth, as specifically as possible, reasons for the recommendation, with any minority report	Written report with clear statement of Committee's conclusions as to inmate's involvement in prohibited acts and action to be taken
9. Written statement by fact-finders as to evidence relied on	Written report to include record of proceedings and evidence, with indication whether Board has relied on evidence not disclosed to inmate	Written report clearly stating offense, time, location, witnesses, inmate's statement, and information on which conclusion is based, with indication whether Committee has relied on evidence not disclosed to inmate

10. Right to counsel (retained or provided by government) upon request, in those few cases where a timely and colorable claim is made of no violation or that there were substantial reasons justifying or mitigating the violations, which reasons are complex or otherwise difficult to develop or present	No right to counsel is provided, but in all cases inmate is offered assistance of staff member, who will be chosen by inmate where feasible	No right to counsel is provided

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* See Appendix, *infra*, pp. 11a-21a.

** See *Scarpelli*, *supra*, 411 U.S. at 786, 790.

*** Proceedings before the Good Time Forfeiture Board concerning loss of good time are preceded by proceedings before the Adjustment Committee and occur only where the Committee has recommended that good time be forfeited or withheld. See Appendix, *infra*, pp. 16a-17a. Accordingly, loss of good time is actually subject to the procedures in both columns.

As the table shows, many of the *Morrissey-Scarpelli* standards are met in federal prison disciplinary proceedings, particularly in the case of good-time withholding or forfeiture proceedings, which are likely to have the greatest impact on the prisoner's liberty.[4] The principal differences between the *Morrissey-Scarpelli* standards and the present federal prison procedures are in the following areas: the right to confront and cross-examine adverse witnesses; the related right to full disclosure in every case of all the evidence that may be relied on in reaching a disposition; the unqualified right to present witnesses; and the right to counsel. (Fuller accommodation of the inmate's interests in these areas is afforded, as previously indicated, in the case of good time forfeiture proceedings than in proceedings through which lesser sanctions can be imposed.)

As we shall show below, while these differences may result in some marginal lessening of reliability or fairness in some instances, such consequences are justifiable in light of the more limited impact of prison discipline on a person's liberty, the unique setting in which such disciplinary action occurs, and the

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[4] In the federal system, as in many state systems, prisoners are entitled by statute to accrue "good time" which, if not forfeited or withheld, results in an early release from the sentence being served. See 18 U.S.C. 4161 *et seq.* In addition, prisoners in the federal system (see 18 U.S.C. 4126, 4162), and many state prisoners, may earn different types of extra good time under discretionary prison rules (*cf.* Pet. App. 40). Forfeiture of good time also affects eligibility for parole (see 28 C.F.R. 2.2, 2.13), at least when the forfeited good time has not been restored (see p. 20, *infra*, n. 9).

multiple purposes of prison discipline in its relationship to that institutional setting.

That such factors must be taken into account in determining the procedures required as a matter of due process is established by *Morrissey* itself, where this Court stated that the question of "what process is due" [8] in a given set of circumstances is to be determined in light of (1) "the private interest that has been affected" and (2) "the precise nature of the governmental function involved."

In holding that the full panoply of *Morrissey-Scarpelli* procedural requirements must also be gen-

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[8] *Morrissey* indicates that the procedural requirements of due process in any given circumstances are to be determined by initially considering whether the governmental action in question results in a deprivation of "liberty" within the contemplation of the due process clause (of the Fifth or the Fourteenth Amendment), so that "some process is due." 408 U.S. at 481. Many disciplinary actions (*e.g.*, segregation, or possibly transfer or loss of certain privileges) are frequently of relatively limited duration and constitute a sufficiently marginal detriment, given the antecedent fact of imprisonment, that it is arguable that, while they may affect matters of importance to the prisoner, they do not involve a deprivation of liberty (or property) for due process purposes. One court of appeals appears to have taken such a position. See *Willard* v. *Britton*, No. 73-1369 (C.A. 10), decided February 7, 1974. But see *Myers* v. *Alldredge*, No. 72-1819 (C.A. 3), decided February 14, 1974; *Braxton* v. *Carlson*, 483 F. 2d 933 (C.A. 3); *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (C.A. 7); *Sostre* v. *McGinnis*, 442 F. 2d 178 (C.A. 2) (*en banc*), certiorari denied *sub nom. Sostre* v. *Oswald*, 404 U.S. 1049. Believing that the procedures of the Bureau of Prisons amply satisfy any applicable due process requirements, we proceed here on the assumption that "some process is due" in the imposition of serious prison discipline.

erally followed in any prison disciplinary proceedings that may result in the imposition of "substantial" or "serious" penalties, "such as incarceration in a dry cell or solitary confinement," and, apparently, loss of good time[6] (Pet. App. 3-4, 6), the court of appeals did not undertake the analysis required by *Morrissey* and failed to consider the crucial distinctions between the purposes, setting and consequences of prison disciplinary proceedings and those of revocation of parole or probation.[7]

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[6] Although the opinion below is not entirely clear on this point, the court of appeals seems to have held that proceedings involving loss of good time must satisfy the *Morrissey-Scarpelli* requirements, but that, in view of *Preiser* v. *Rodriguez*, 411 U.S. 475 (requiring that challenges to the duration of confinement be made in habeas corpus proceedings), the district court was limited in the relief it could grant in this action and could not restore good time (Pet. App. 5-7; 483 F. 2d at 1063-1064).

[7] Because petitioners conceded below that revocation of good time is subject to minimal due process requirements and contend that the question of good time "is no longer in the case" (Pet. Br. 22-23; see Pet. Br. 11; see also p. 18, *supra*, n. 6), the question presented here concerns due process requirements only in prison disciplinary proceedings resulting in "serious" or "substantial" penalties other than loss of good time. However, we do not join in petitioners' concession regarding good-time forfeiture proceedings insofar as it may be taken to mean that proceedings resulting in loss of good time must include procedures beyond those now provided by the Bureau of Prisons' rules.

A. Prison Disciplinary Proceedings Affect Substantially More Limited Private Interests than Does Revocation of Parole or Probation, so that Less Stringent Procedures Need be Required.

In *Morrissey* the Court observed that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievious loss' on the parolee and often on others." 408 U.S. at 482. "Though the State properly subjects [the parolee] * * * to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." *Ibid.* It is thus a "serious deprivation" (*Scarpelli, supra*, 411 U.S. at 781) to have one's parole or probation revoked, with long-term consequences comparable to a new conviction.[8] Moreover, the seriousness of such a decision is compounded by the question whether revocation is "unnecessarily interrupting a successful effort at rehabilitation" and whether non-revocation would be "imprudently prejudicing the safety of the community." *Id.* at 785. It was in such a context that this Court decided the content of the various due process requirements that have to be met before revocation was justified. The Court indicated that it would be an entirely different matter to extend these requirements to the prison setting—

[8] Upon revocation of parole or probation, the parolee or probationer must ordinarily return to or enter prison to serve the balance of the original sentence (or such sentence as may then be imposed, if none had previously been imposed (see, *e.g.*, 18 U.S.C. 3653, 4205)). The ensuing period of incarceration may well exceed the time, if any, already served. For

where authorities have the problem of "controlling a large group of potentially disruptive prisoners in actual custody." *Morrissey*, *supra*, 408 U.S. at 483.

Inherent in the very nature of imprisonment is the deprivation of the prisoner's liberty, although the degree of that deprivation may vary depending on the nature of the institution in which the prisoner is incarcerated, the term of imprisonment, other conditions contained in the sentencing authority's determination, and a variety of other factors. Unlike the outside world, the prison environment is typically a closed society in which a number of inmates reside involuntarily in close, round-the-clock proximity, often for substantial periods of time, under the supervision and control of a limited number of prison staff members. For prisoners, as this Court has noted, "eating, sleeping, dressing, working, and playing are all done under the watchful eye of the [government] * * *." *Preiser* v. *Rodriguez*, 411 U.S. 475, 492.

One in prison, therefore, in contrast to a parolee or probationer, has already, through due process of law, been deprived of liberty in the most pervasive manner. Cf. *Price* v. *Johnston*, 334 U.S. 266, 285. None of the principal varieties of prison discipline (with the possible exception of a loss of good time [9])

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example, in *Morrissey* one parolee had at least six years of a seven-year sentence remaining, and the other had at least eight years remaining on a ten-year sentence. In *Scarpelli* the probationer had a fifteen-year sentence to serve.

[9] We note that, unlike revocation of parole or probation, loss of good time may only involve a matter of days and need

even remotely approaches in magnitude the deprivation of liberty confronting one forced to go from free society to prison, even though to the inmate the imposition of discipline may be of "major concern." Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 570.

B. The Multiple Purposes and Unique Institutional Setting of Prison Discipline Require More Flexible Procedures than for Revocation of Parole or Probation.

The current rules of the Bureau of Prisons concerning prison discipline are the product of an ongoing evolutionary process. (Pertinent aspects of the history of the federal prison system and the development of the current rules are set forth in the Appendix to this brief.) In developing these rules, the Bureau of Prisons has attempted to take into account the purposes which prison discipline is intended to serve and the unique institutional setting in which it occurs. The result has been a cautious but steady augmentation and refinement of the procedural rights extended to inmates.

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not have a substantial effect on a prisoner's liberty. For example, under Bureau of Prisons procedures only the good time creditable in the month of a violation may be withheld without the more elaborate procedures pertaining to a forfeiture of good time (see Appendix, *infra*, pp. 16a-17a), and the maximum amount of good time that can be earned in one month is about fifteen days, depending upon the length of the sentence being served. 18 U.S.C. 4161, 4162. Whether good time is forfeited or withheld, moreover, it may be totally restored before it has had any adverse impact on the date of the prisoner's eventual release. See, *e.g.*, *Meyers* v. *Alldredge*, *supra* (situation of plaintiffs Moore and McAllister described in Appendix to opinion). See generally Appendix, *infra*, pp. 20a-21a.

The following discussion of factors bearing on the decisions made by federal prison authorities in establishing those rights is not intended to suggest that the Bureau of Prisons has a monopoly on wisdom in these matters, nor that arguments cannot be made in support of a different array of procedures. It is intended, rather, to show that the current rules represent a reasoned and reasonable accommodation of conflicting interests, developed by the authorities who bear the heavy burden of maintaining order in a closed society of atypically disorderly people and of attempting to rehabilitate those people through adjustment of their antisocial tendencies. We submit that the judgment of the expert administrators on these questions is entitled to considerable weight.

(1) ***The unique institutional environment of prisons.***

Prisons differ from the free society of the world outside in many significant respects. They are populated by a group of people who have not chosen to be there, but rather have been deprived of their liberty by the authority of the state because they have been found to have violated one or more of the laws established by society for its orderly governance. Indeed, an unfortunately large number of inmates are in prisons not for the first time.[10] The range of offenses

[10] For example, according to the as yet unpublished annual report of the Bureau of Prisons for fiscal 1973, more than 60 percent of the inmates in federal prisons at the end of that year had at least one known prior commitment to a state or federal prison (based on a prior conviction) and 30 percent had at least three or more such prior commitments. Nearly

for which they have been committed is broad, including many serious crimes of violence, escape from custody, bribery, extortion, and the like. By definition, prison inmates share the characteristic of having one or more times resorted to seriously illegal means to achieve their goals or to resolve problems confronting them. In many cases, moreover, the prior offenses will provide grounds for legitimate concern that the inmate might try to interfere improperly with the course of disciplinary proceedings against him.

Many inmates enter prison with feelings of hostility and frustration, perceiving themselves to have been innocent or unfairly convicted, whether or not any objective observer would agree. Such a refusal to accept guilt for wrongdoing and a concomitant tendency to project blame on others are often seen in prisoners' attitudes towards events occurring in prison and their responsibility toward them. See, *e.g.*, Halleck, *Psychiatry and the Dilemmas of Crime* 306 (1st ed. 1967); Abrahamsen, *The Psychology of Crime* 110 (1st ed. 1960).[11]

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10 percent, moreover, were confined because of violation of the terms of parole or mandatory release. A further unknown proportion of inmates had prior convictions for which they had not been committed. The apparently high rate of recidivism is, of course, not indicative of the results following release from a *federal* prison.

[11] Refusal to accept guilt for any wrongdoing may be especially prevalent in a penitentiary, where there are older, more criminally sophisticated offenders. Thus, disputation of the charges and emotional confrontations are likely to be especially frequent in prison hearings. See, *e.g.*, Halleck, *supra*, at 110.

Moreover, the constant exposure of prisoners to the supervision and control of the prison staff in this setting may tend, not infrequently, to breed hostility and tension between the two—to a greater extent and with a sharper focus than in almost any setting in the outside world. The characteristics of prison life and inmate-staff relationships in many prisons (though not necessarily all federal prisons) thus include an ever-present potential for explosive confrontations in which the prisoners give vent to hostilities and frustrations or members of the staff overreact due to their sense of belonging to a beleaguered, alienated, and often disliked minority having only a tenuous control over the situation. Cf. *Edwards* v. *Sard*, 250 F. Supp. 977, 981 (D.D.C.).

Testimonial confrontations can usually be handled fairly well in free society. There, the relationships between the individual and witnesses opposing him, and the hostilities arising from the confrontation experience, may ordinarily be diffused in numerous ways—sometimes by the action of the hearing official or other authorities, but more often by the fact that the individual affected, and others who have confronted him, may return to their respective homes, avoiding further contact and venting their emotions in less explosive surroundings.

Diffusion of antagonisms occurs less readily in the typical prison setting, where the parties always remain in close proximity to each other and where many inmates are characteristically impulsive and action-oriented. See Halleck, *supra*, at 284; Eysenck, *Crime and Personality* 144 (1964). Hostilities

sparked in a disciplinary hearing may easily be fanned into flames of violence or mutiny in the close confines of the prison.

In the case of staff witnesses, the supervisory counseling relationship essential to achievement of correctional goals may be disrupted or destroyed by the confrontation experience. Moreover, confrontation might place the inmate in a position of equal contest with the correctional officer and thereby permit an erosion of the officer's control and authority. See McCorkle, *Guard-Inmate Relationships in Prison*, in *The Sociology of Punishment and Correction* 108-110 (Johnston, Savitz & Wolfgang ed. 1962). The effect of confrontation would perhaps be even more drastic in the case of the inmate witness who has observed or been the victim of misconduct by another prisoner. The subsequent animosity which might result from a confrontation in a disciplinary hearing would continue in the close confines of the prison and might in many circumstances result in violent retribution or the need to make extraordinary provision for the protection of the inmate-witness. See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 46 (1967).[12]

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[12] A widely noted phenomenon representing a psychological response to the peculiar demands of prison life is the unwritten "inmates' code," one of the first principles of which is that "inmates stick together" and that those who breach the code risk reprisals. See generally Kassebaum, Ward & Wilner, *The Inmate Code and Attitude Change*, in *Prison Treatment and Parole Survival: An Empirical Assessment*, ch. VI (1971);

One conclusion that may be drawn from consideration of the prison environment, accordingly, is that direct confrontations between inmates and staff, as well as between inmates, are to be avoided wherever possible. Otherwise, "prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point * * *." *Braxton* v. *Carlson*, 483 F. 2d 933, 941 (C.A. 3).

(2) *The integral relationship between the rehabilitative purpose of imprisonment and the role of discipline.*

The role of discipline in prisons today reflects a series of evolutionary changes over the past 200 years which have occurred as a result of changes in public policies and attitudes toward the role of prisons themselves—an evolution which is certain to continue even without the imposition of specific constitutional constraints on the operation of prisons. The history of this development (set forth in greater detail in the Appendix to this brief) reveals that, as the purposes to be served by imprisonment have changed, so have the nature and role of discipline within the prisons.

Imprisonment is now seen more than previously as having as a major purpose the rehabilitation of the inmate through affirmative programs such as counseling and training. Cf. *Williams* v. *New York*, 337 U.S. 241, 248-249, n.13. In this more sophisticated concept, institutional discipline is seen by prison officials as no longer serving only the narrow purpose of

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Sykes & Messinger, *The Inmate Social Code and its Functions*, in *The Sociology of Punishment & Correction*, *supra*, ch. 14.

maintaining order within the prison. It is also intended to serve the larger goals of the institution as a whole—*i.e.*, to develop self-reliance, self-control, self-respect, and self-discipline, not merely the ability to conform to institutional rules and regulations but the ability and desire to conform to accepted standards of individual and community life in a free society. See Eysenck, *supra*, at 144-161.

Thus, it is now widely agreed by correctional authorities that

> [d]iscipline * * * looks beyond the limits of the inmate's term of confinement. It must seek to insure carry-over value by inculcating standards which the inmate will maintain after release. It must always be objective and must develop in the inmate personal responsibility to that social community to which he will return. [American Correction Association, *Manual of Correctional Standards*, ch. 24.7.]

Accordingly, the stated goals of inmate discipline are now largely synonymous with those of the correctional process itself, *i.e.*, modification of the criminal value system. Richmond, *Prisoner Management and Control* 14 (1969).[13]

To maximize rehabilitation, many prison authorities believe that the disciplinary process should mini-

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[13] It has been said that "[t]he administrative manipulation of rewards, favors, privileges, and punishments with a view to promoting changes in value identification" is "a central administrative objective" in obtaining a shift in the inmate's value orientation. Ohlin, *Modification of the Criminal Value System*, in *The Sociology of Punishment and Correction*, *supra*, at 179.

mize as much as possible the alienation of the offending inmate from the staff and from his fellow inmates; should promote in him a clear regret for having committed the offense; and should offer him a course of conduct which will allow his restoration to good standing. Glaser, *The Effectiveness of a Prison and Parole System* 121 (1969). Working upon these hypotheses, the Bureau of Prisons and many state systems have adopted procedures which interrelate discipline with effective counseling, whereby discipline serves to a significant extent as a part of the entire correctional process and is not necessarily limited to the individual instance of misconduct.[14]

In establishing and modifying a disciplinary system, prison officials believe they must tread a difficult middle ground between procedures and programs that may be so strict as to be unfair and counterproductive and those that do not embody sufficient control to achieve their ends. In articulating the need to maintain this delicate balance, one experienced prison official has observed:

> The evil effects of harsh discipline are readily recognized. Brutal punishments have been tried and found wanting. Lax discipline can be equally injurious to the morale of the prisoners and even

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[14] In the view of Dr. Glaser (*id.* at 122-123), a system of flexible rules and constructive penalties requires

> a government of men, not laws, in the prison, which might seem against the American governmental tradition. However, it is appropriate to deviate partially from this tradition in a prison which achieves its primary goal, that of rehabilitating offenders, through relationships between staff and inmates.

> more injurious to the maintenance of security and good order. The prisoner frequently has the same Beccarian concepts of punishment as the layman in a free society [referring to the utilitarian philosophy of Beccaria, the eighteenth century Italian criminologist]. The prisoner who wants to do his time and get it over with has little liking for a prison where he can find no sense of direction in a maze of favoritism, prison politics, variable rules, indefinite procedures in discipline, and the hypocrisies that underlie weak administration. [McKendrick, *Custody and Discipline*, in *Contemporary Correction* 169 (Tappan ed. 1951)].[15]

The prison disciplinary process has also been said to involve other important practical factors—including the need for correctional officials to sustain their authority and the need in many cases for quick and simple decisional procedures[16]—which may militate

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[15] While some commentators attribute prison riots and disorders to "repressive" disciplinary practices and other abuses, research indicates that in many instances these problems stem from administrative weakness. As Professor Tappan has noted:

> It is only too clear that appeasement of rioting inmates in some penal institutions has stimulated riots in others. The discovery that threats, violence, and destruction may gain concessions has had anomalous consequences. Riots have produced some changes in prison programs and, incidentally, have provided fictitious color of accuracy to the contention that abusive conditions incited the riots. [Tappan, *Crime, Justice and Correction* 701-702, n. 68 (1960).]

See also McCorkle, *supra*, at 108-109.

[16] Many behavioral scientists have emphasized that discipline generally should closely follow the violation if it is to

against the application of the full panoply of due process protections that are required in some non-prison contexts. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 12-13 (1967).

To reconcile these interests, many correctional systems, including the Bureau of Prisons, have adopted flexible hearing procedures more informal in significant respects than those of a criminal trial.[17] These procedures represent an effort to balance important and to some extent conflicting goals: on the one hand, the need for expeditious and non-inflammatory resolution of misconduct reports; on the other, the goal of reducing the risk of unfair, arbitrary, or factually unfounded disciplinary action.

One measure of flexibility in prison discipline consists of the increasingly wide range of potential sanctions which have resulted from the changes that have

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be effective in behavior modification. See generally Bandora, *Principles of Behavior Modification* (1967); Krasner & Ullman, *Research in Behavior Modification* (1965); Skinner, *Science and Human Behavior* (1953).

[17] Flexibility in approach and procedures is a key element in the correctional context. As one observer has noted:

> [O]bjectionable behavior by men in prison is so diverse that no set of rules could encompass it without being long, complex, and difficult to apply, or so arbitrary that it would arouse resentment by dealing similarly with highly diverse acts. It follows that strain in inmate-staff relationships is minimized by a policy of flexible rules interpreted to fit each case which takes into account primarily the effect of each penalty on the future behavior of the offender. [Glaser, *supra*, at 120-121.]

occurred in the general method of operations of prisons. When, a century ago, all prisoners lived essentially in segregation, there were few alternatives to the corporal punishment that was widely imposed as the chief mode of discipline. As prison life has become more humane, the disciplinary options have increased in number, variety and range of seriousness. Some misconduct may of course itself be the basis for criminal prosecution. See, *e.g.*, 18 U.S.C. 751, 1114, 1791-1792. In addition, the choices of prison-administered discipline now include forfeiture or withholding of good time (perhaps the most serious); placement in segregated status; transfer to another institution; loss of privileges such as recreation time, television viewing, or participation in special events; informal reprimands by the staff. See McKendrick, *supra*, at 168.

In view of the emphasis placed in prison discipline on rehabilitation and adjustment of the inmate's attitudes, the attendant value of promptness in the imposition of disciplinary action and flexibility in its selection, and the likelihood that direct, adversarial confrontations will seriously interfere with the rehabilitative process, there are substantial considerations weighing against extension of all the *Morrissey-Scarpelli* requirements to this very different context.

(3) ***Recognition of rights to counsel, confrontation of witnesses and disclosure of all evidence might seriously impair prison security and the efficacy of the prison disciplinary process.***

From the foregoing discussion of the role of discipline in the unique prison environment, several substantial reasons emerge for the decision of prison officials not to extend to all prison disciplinary proceedings the full panoply of procedures outlined in *Morrissey* and *Scarpelli*. The introduction of rights to confront all witnesses and to be assisted by an attorney is likely to convert prison disciplinary proceedings into mini-trials, with a consequent distraction of attention from the rehabilitative focus of such proceedings, as well as a potential detriment to the important function of maintaining discipline.[18]

In *Scarpelli* this Court noted various respects in which "[t]he introduction of counsel into a [parole or probation] revocation proceeding will alter significantly the nature of the proceeding" (411 U.S. at 787-789), and concluded that "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings * * *." *Id.* at 790. In reaching this conclusion, the Court observed (*id.* at 787-788):

> If counsel is provided for the probationer or parolee, the State in turn will normally provide

[18] To paraphrase this Court's description of the somewhat analogous matter of military discipline through courts-martial, a prison disciplinary proceeding is not "an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which * * * [prison] discipline is preserved." *O'Callahan* v. *Parker*, 395 U.S. 258, 265.

its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate other than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.

Such considerations apply *a fortiori* to prison disciplinary proceedings, in which the prisoner has a significantly lesser private interest at stake than does a parolee or probationer facing revocation. Apart from the inevitable transformation in the nature of the proceedings by virtue of the presence of counsel, a requirement of counsel will also introduce a significant element of delay. Indeed, prisons are frequently in isolated locations, so that a requirement to await counsel, whether retained or provided by the government, would tend to result in delays over and above such delays as might result from actions taken by counsel and from the generally increased formali-

zation of the proceedings. The Bureau of Prisons is of the view that delay in the determination and imposition of disciplinary action is undesirable and tends to interfere with the efficacy of the action taken in serving its rehabilitative and other purposes. In other words, the balance has been struck against participation by counsel largely because of an assessment that the potential gain in accuracy of factfinding is outweighed by other important and legitimate considerations.

The right to confront all witnesses and to have all evidence disclosed is limited in prison disciplinary proceedings not only to protect witnesses from reprisals, but also to minimize the frequency of confrontations between inmate and staff or among inmates. As noted above, prison officials believe that such confrontations not only may interfere with the rehabilitative process but also are likely to result in increased tension and hostility between those involved, which might lead to further misconduct or disorder, possibly of a more serious nature.

Finally, we note that a general confrontation requirement could have undesirable consequences extending beyond those instances in which confrontation actually occurs, since the effect of such a requirement will surely be to discourage inmates from reporting disciplinary infractions to prison authorities (the knowledge that they will be openly identified as violators of the "inmates' code" (see p. 25, *supra*, n. 12) will operate as a powerful deterrent). This result would prevent the needed imposition of disci-

pline in many situations and could contribute to a measurable decline in the security of the inmates and in the general level of discipline in the institution. While, in the case of proceedings leading to a criminal conviction or (to a lesser extent) revocation of probation or parole, it may be constitutionally impermissible to allow action to be taken on the basis of evidence supplied by unconfronted witnesses, the radically different balance of circumstances in the prison discipline context necessitates a more flexible constitutional standard."

Most of the courts of appeals that have considered the issue have concluded that the full range of procedural requirements set forth in *Morrissey* and *Scarpelli* should not be imposed upon prison disciplinary proceedings. See *Meyers* v. *Alldredge*, *supra*;[20] *Willard* v. *Britton*, *supra*; *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (C.A. 7); *Adams* v. *Carlson*, 488 F. 2d 619 (C.A. 7);[21] *Sostre* v. *McGin-*

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[19] In *Sostre* v. *McGinnis*, *supra*, 442 F. 2d at 196, the court observed, in rejecting a requirement of confrontation of witnesses, that prison disciplinary proceedings "should not be viewed as adversarial in the same sense that a criminal trial is adversarial," and that "[t]o dispose sensitively and carefully of each prisoner's unique case with due regard for the effect of each decision on the total fabric of the prison community, prison authorities must have wide access to relevant information." See also *Williams* v. *New York*, *supra*.

[20] In *Meyers*, the Third Circuit rejected claims that confrontation, cross-examination and the right to counsel are necessary procedural safeguards at prison disciplinary hearings involving forfeiture of good time.

[21] In *United States ex rel. Miller* v. *Twomey*, *supra*, the Seventh Circuit expressed "disagreement with the proposition

nis, supra. As the Third Circuit pointed out in *Braxton* v. *Carlson, supra,* 483 F. 2d at 941:

> [T]he focus of the Adjustment Committee function is rehabilitative rather than punitive. We believe, therefore, that the transformation of this informal hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses, and written record could be self-defeating. * * *

In *Braxton*, the court held that any due process safeguards should be directly related to the prison disciplinary setting. Characterizing as erroneous the assumption that prison disciplinary proceedings are adversarial in the same sense as is a criminal trial, the court stated that "[d]ue process in a correctional institution setting should not be 'so rigid as to re-

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that whatever procedural safeguards are required for a parole (or probation) revocation hearing are also necessarily applicable to an in-prison disciplinary hearing." 479 F. 2d at 716, n.31. Accordingly, the court held that there is no absolute right to confront or cross-examine witnesses and said it was doubtful that counsel or a lay substitute is essential. *Id* at 715. The court held, however, that due process requires at least that a prisoner receive advance written notice of the charges against him and be afforded a fair opportunity to explain his version of the events (possibly including a right to insist that witnesses be called or interviewed) and that the factual determination must not be made by the officer who reported the infraction. *Id.* at 715-716. These requirements are substantially met under present Bureau of Prisons' procedure. In *Adams* v. *Carlson, supra,* the Seventh Circuit held that the standards of *Miller* applied to prior disciplinary actions in a federal prison and remanded the case to the district court to determine whether the *Miller* standards were satisfied and whether they should be enlarged.

quire that the significant interests of informality, flexibility, and economy must always be sacrificed.'" 483 F. 2d at 940 (quoting *Scarpelli*, 411 U.S. at 788).

The court went on to express what we consider to be essentially the correct view of the governing constitutional standards (*ibid.*):

> In light of the combined goals of fact determination and correctional treatment and rehabilitation intrinsic in the Adjustment Committee's tasks, we agree with the Second Circuit that due process is present when facts are rationally determined in a proceeding where the prisoner (1) is notified of the accusation and informed of the evidence against him, and (2) is afforded a reasonable opportunity to explain his actions [citing *Sostre*, *supra*].

Finally, the question of procedural requirements for the administration of prison discipline is, we respectfully submit, one that courts should approach with a full awareness of its complexity and of the limitations that exist on the ability of the judiciary to deal in detail with the problem at this time, given the present state of knowledge on the subject. As the Second Circuit observed in *Sostre* (442 F. 2d at 197; footnote omitted):

> It would be too simplistic to dissociate the impact of punishment meted out after a disciplinary hearing from the method by which the hearing itself is conducted. As one court has observed: "The association between men in correction institutions is closer and more fraught with physical danger and psychological pressures

than is almost any other kind of association between human beings." *Edwards* v. *Sard*, 250 F. Supp. 977, 981 (D.D.C. 1966). It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships among prisoners and prison officials. * * * We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

We are particularly unwilling to interfere with state administrative processes when reliable, detailed information or empirical studies are as scanty as they are on the subject of prison disciplinary procedures. * * *

Moreover, the suggested deference to the experience of those charged with the administrative responsibility for devising and operating the prison disciplinary system [22] is supported by the knowledge that the Bu-

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[22] In this connection, we concur with petitioners' contention that the court of appeals erred in directing that the district court adopt the appropriate due process standards without first permitting prison officials an opportunity to formulate suitable guidelines. In our view, the proper initiators

reau of Prisons, like other prison systems, has been engaged in a careful but steady development of added procedures beneficial to the prisoner yet consistent with the unique demands of the prison environment and the multiple purposes of prison discipline (including, most recently, a new federal prison grievance procedure; see Appendix, *infra*, pp. 21a-23a). This developmental process, reflecting experience with prior changes, evolving public policy towards prisons, and expanding knowledge of the social dynamics of the prison community, ought not be rigidly circumscribed by inflexible procedural requirements imposed at this time as a matter of constitutional mandate.[22]

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of change in existing procedures are the professional prison administrators and not the courts. We do not mean to suggest that federal courts must abstain altogether from eliminating arbitrary or inadequate procedures; rather, we suggest that prison officials should be given the initial opportunity to adopt sufficient safeguards. As the Third Circuit properly observed with regard to the role of the courts in formulating affirmative guidelines for prison administrators: "Our expertise is limited; our knowledge of the extensive day to day prison problems is minimal; our ability to foresee the effect of procedural changes on treatment, rehabilitation and programmatic process is imperfect." *Braxton* v. *Carlson*, *supra*, 488 F. 2d at 942; see *Gittlemacker* v. *Prasse*, 428 F. 2d 1, 4 (C.A. 3); see also *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 488-489; *Sostre* v. *McGinnis*, *supra*, 442 F. 2d at 205.

[22] We believe that there are likely to be special problems attendant upon overly rapid introduction of change into the prison environment. The maintenance of good order and the security of guards and inmates alike in a frequently hostile prison environment depend substantially on the existence of rules of conduct and established procedures for the prison, as well as on physical means such as walls and locks. Prison

II. PAST PRISON DISCIPLINARY ACTIONS SHOULD NOT BE INVALIDATED FOR FAILURE TO COMPLY WITH ANY NEW PROCEDURAL REQUIREMENTS THAT MAY BE ANNOUNCED IN THIS CASE.

The court of appeals held, without discussion of the issue, that prison disciplinary proceedings antedating its own decision and even this Court's decisions in *Morrissey* and *Scarpelli* must be set aside, and the records of misconduct expunged, whenever the proceedings did not satisfy the procedural requirements for revocation of parole and probation announced by the Court in *Morrissey* and *Scarpelli* (Pet. App. 7; 483 F. 2d at 1064).[24] We believe that

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staff members often prefer that strict rules be maintained and enforced, and may tend to feel threatened and weakened by changes in prison rules which appear to favor the prisoners. Prisoners, on the other hand, may feel that, once a rule has been changed in a way they perceive as favorable, the new rule is a matter of right, the revocation or alteration of which is likely to engender new hostilities. While neither of these opposing considerations should be the exclusive determinant of whether rules should be changed, they both caution against unduly frequent and possibly temporary or experimental changes in prison rules. It is the view of the Bureau of Prisons that significant changes in such rules should be preceded by careful consideration of the ramifications for all aspects of the unique prison environment, and that experimental changes, if necessary, should be made on a limited basis before being widely applied to all of the varied prison settings. See, *e.g.*, Appendix, *infra*, pp. 21a-23a.

[24] Since the court of appeals announced this broad expungement consequence of its holding without any analysis or discussion of the retroactivity question, it is not clear whether it meant its holding to encompass a general principle of retroactivity or to apply only to the litigants in this case (either

the court of appeals erred in this regard insofar as its decision may be viewed as adopting a principle of retroactivity, and that any decision by this Court imposing procedural requirements on prison discipline ought not to be retroactive in effect.

We submit that the question of retroactivity of new procedural rules affecting inquiries into infractions of prison discipline is effectively foreclosed by this Court's ruling in *Morrissey* that the due process requirements there announced were to be "applicable to *future* revocations of parole" (408 U.S. at 490; emphasis supplied).[25] There is no rational basis for giving retroactive application to any due process standards for prison disciplinary proceedings that may be announced in this case when such effect has not been accorded the rules regarding parole and probation revocation proceedings. On the contrary, the reasons for limiting such rules to prospective effect are even more compelling in this area.

This Court has delineated several factors which are relevant in determining whether rulings should be applied retroactively or prospectively: (a) the

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the individuals or the entire class of prisoners at the Nebraska Complex). Our concern is with the possibility that the holding is to be construed to apply a broad retroactivity principle, and we address ourselves solely to the issue of general retroactivity and not to any question regarding the scope of relief appropriate for these litigants, including the propriety of expungement as a remedy.

[25] We note that the issue of retroactive application of the *Morrissey* standards was presented to this Court last term, but the Court declined review. See *Landman* v. *Carlson*, 463 F. 2d 218 (C.A. 5), certiorari denied, 410 U.S. 985.

purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of new standards. See, *e.g.*, *Linkletter* v. *Walker*, 381 U.S. 618, 629, 636; *Tehan* v. *Shott*, 382 U.S. 406, 410-418; *Johnson* v. *New Jersey*, 384 U.S. 719, 726-727; *Stovall* v. *Denno*, 388 U.S. 293, 297; *Desist* v. *United States*, 394 U.S. 244, 249; *Michigan* v. *Payne*, 412 U.S. 47, 55; *Gosa* v. *Mayden*, 413 U.S. 665.

With respect to the "purpose" criterion, there is no meaningful distinction between the purpose of the *Morrissey-Scarpelli* rules (that "the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior," *Morrissey*, *supra*, 408 U.S. at 484) and the purpose that would impel the Court to enunciate particular due process requirements for prison disciplinary proceedings—presumably a desire to reduce the likelihood that disciplinary measures will be undertaken on the basis of mistaken conclusions regarding the pertinent facts. If this concern was not sufficient to require retroactivity in *Morrissey*, it is difficult to see how it could possibly justify retroactivity in the instant case, where, as previously argued, the interests that would be harmed by action based on factual error are of reduced magnitude in comparison with the imprisonment of an individual resulting from revocation of parole.

The factor of governmental reliance militates with equal force in *Morrissey* and here in support of prospectivity. Prior to *Morrissey*, state and federal prison authorities had no reason to suspect that such procedures as they followed in imposing discipline might be constitutionally deficient. Procedures were developed as a matter of policy, not of constitutional necessity. Even after the decisions in *Morrissey* (June 29, 1972) and *Scarpelli* (May 14, 1973), prison officials have had ample grounds for good faith reliance upon the pre-*Morrissey* assumptions, because numerous courts have held that the *Morrissey* procedures were not applicable to prison discipline. See cases cited at pp. 35-36, *supra*. Thus, to the extent that reasonable governmental reliance on the validity of the old procedures supports prospectivity, it is fully applicable here.

It is in consideration of the third criterion—the effect of retroactivity on the administration of justice—that the need for prospectivity emerges most clearly. *Morrissey* recognized the severe disruption to state and federal correctional systems that would follow the retroactive imposition of procedural requirements not previously mandated or widely followed. The same considerations apply with even more compelling force in the area of prison disciplinary proceedings. We are informed that during fiscal 1973, the United States Board of Parole conducted 1173 parole revocation hearings and there were 2023 federal probation revocation hearings. During the same period, however, the Federal Bureau of Prisons held

approximately 19,000 misconduct hearings.[28] The impact of retroactive application of standards relating to misconduct hearings would therefore be enormous. As a practical matter, the result could be complete expungement of all records of prison disciplinary proceedings, since it would be virtually impossible to undertake reconsideration of such a vast volume of cases.

One serious consequence of such a development would be a material impairment of the functioning of the parole system. Congress has made eligibility for parole turn specifically on a showing that the prisoner "has observed the rules of the institution in which he is confined." 18 U.S.C. 4202. Wholesale expungement of records of disciplinary actions would make it impossible to determine whether this requirement has been satisfied in the case of any particular applicant for parole. While the Board of Parole could (and presumably would have to) proceed on the fiction that every prisoner has satisfactorily observed the rules of his institution, it can hardly be supposed that action taken on this basis will assist the Board of Parole in accurately judging whether

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[28] There were approximately 18,000 Adjustment Committee hearings and 1,000 Good-Time Forfeiture Board hearings. While this might suggest at first glance that most of the 23,000 federal prison inmates are involved in disciplinary proceedings during any given year, that is not in fact the case. Most inmates are rarely, if ever, involved in such proceedings; a small minority with severe adjustment and behavior problems, on the other hand, are repeatedly involved in disciplinary problems and account for a substantial portion of these proceedings.

"there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and * * * such release is not incompatible with the welfare of society * * *." 18 U.S.C. 4203(a).

Of course, if the Court does hold that procedures such as those utilized by the Bureau of Prisons for the conduct of disciplinary proceedings have been constitutionally defective, such a holding would have to flow from a concern that existing procedures entail an excessive risk of unjustified imposition of disciplinary measures in some cases. In those cases there would, in turn, be an enhanced risk of unjustified denial of parole. But these would still be a substantial minority of the cases; in the vast majority of cases, the existing procedures would still have reached entirely correct and justified results—results that society has a significant interest in considering insofar as they bear on such important matters as the granting of parole. A balance must be struck, and, in this area, we submit that the balance is decisively weighted in favor of non-retroactivity.

III. PRISON OFFICIALS SHOULD BE PERMITTED TO INSPECT INCOMING MAIL FROM ATTORNEYS FOR THE LIMITED PURPOSE OF DETERMINING IF IT CONTAINS CONTRABAND.

The instant case also presents an important question regarding the authority of prison officials to open (but not read)[27] incoming mail from attorneys

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[27] Although the Nebraska prison regulations in effect when the suit was commenced authorized the opening and reading of all incoming and outgoing mail (Pet. App. 34), it should

to inspect for contraband. The court below affirmed that portion of the district court's order which held (Pet. App. 11; 483 F. 2d at 1066):

> [I]ncoming mail may be opened only if manipulation of the envelope, use of fluoroscopes and metal detectors or other alternate means fail to disclose contraband and there is a real possibility that contraband will be included in such mail * * *.

We agree with petitioners that this holding represents an unrealistic approach to attorney-inmate correspondence and poses serious problems for prison security.

Pursuant to policies presently in effect, the Bureau of Prisons does not open or inspect correspondence from inmates addressed to an attorney.[25] With respect to incoming mail, however, correspondence addressed to an inmate by an attorney may be opened, solely for the purpose of inspection for physical contraband, even though there may be no special or particular basis for suspicion. This mail is neither read nor copied by the prison authorities. In addi-

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be noted that the petition raises only the narrow question whether the restrictions imposed by the court below on the opening of mail from attorneys, in the inmate's presence, to inspect for contraband without reading the mail, were justified (Pet. 15-16; see Pet. Br. 45-46).

[25] Attached to the inmate's letter is a statement from the chief executive officer of the institution advising counsel (1) that the facility retains the right to open mail from attorneys to inspect for physical enclosures constituting contraband, (2) that such mail will not be read or copied, and (3) that inspection will be conducted in the presence of the inmate, if the attorney so indicates on the envelope.

tion, inmates are advised that, at their option, and with the concurrence of their attorney, mail from the attorney will be opened only in the inmate's presence. The incoming correspondence is immediately stamped upon arrival to show date and time of receipt. When the inmate elects to have the mail opened in his presence, the contents are marked to show time of delivery. Bureau of Prisons, Policy Statement 2001.2B, "Access to Legal Reference Materials and Legal Counsel and Preparation of Legal Documents," issued May 8, 1972.

It is axiomatic that prison authorities may not, through correspondence regulations, hamper an inmate's access to the courts. *Ex parte Hull*, 312 U.S. 546. We agree that correspondence with counsel is an essential element of that access. However, limited inspection of incoming mail from counsel, as conducted under current federal rules, does not unduly infringe on these principles and does not, as a practical matter, impair an inmate's access to the courts or to his attorney. See *Wilkinson* v. *Skinner*, 462 F. 2d 670, 672 (C.A. 2); *Smith* v. *Robbins*, 454 F. 2d 696 (C.A. 1); *Holt* v. *Hutto*, 363 F. Supp. 194, 210 (E.D. Ark.); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 689 (D. Mass.) (right to read incoming mail limited only as to attorneys in same state as jail); *Brenneman* v. *Madigan*, 343 F. Supp. 128, 141-142 (N.D. Cal.). See also Comment, *Judicial Recognition of Prisoners' Constitutional Right to Send and Receive Mail*, 76 Dick. L. Rev. 775, 788 (1972).

The more stringent standard endorsed by the court below ignores the realities of the institutional setting. As a recent report indicates:

> Contraband must be excluded from correctional institutions to preserve their security and good order by limiting the development of inmate power groups often resulting from acquisition of contraband. The standard authorizes the correctional administrator to inspect incoming and outgoing mail for contraband but not to read or censor the contents. [National Advisory Commission on Criminal Justice Standards and Goals, *Report on Corrections* 67-68 (1973).]

Similar problems have been recognized by the courts. One particular example was discussed by the court in *Holt* v. *Hutto*, *supra*, 363 F. Supp. at 210:

> [T]he Court can easily see how a lawyer might mail his client a check, money order, or currency. It has long been prison policy to prohibit inmates from having in their possession what is called "free world" or "green" money. The reasons for the prohibition are obvious. An inmate with currency in his possession may be the subject of attack by other inmates; an inmate with funds is in a better position after escape than an inmate who has no money; the money in the possession of an inmate may be used to bribe guards or other prison employees.

The court of appeals dismissed these arguments with the observation that "the danger that a letter from an attorney, an officer of the court, will contain contraband is ordinarily too remote and too speculative to justify the defendants' regulation * * *"

(Pet. App. 12; 483 F. 2d at 1067).[29] If prison officials have doubts about the authenticity of the letter, the court suggests that "a simple phone call" should prove sufficient to settle the matter.

Such a requirement, however, would prove excessively burdensome in light of the vast amount of correspondence addressed to inmates from persons identifying themselves as attorneys.[30] Indeed, a sizeable portion of such correspondence may not in fact be sent by the attorney but rather by a staff assistant or para-professional, under no legal or ethical compulsion to behave as an "officer of the court." Compare Brief for Appellants at 24-30, *Procunier* v. *Martinez*, No. 72-1465. Moreover, the effect of the holding below would vest in the inmate's attorney, rather than prison administrators, the ultimate determination of what articles constitute contraband—a result that is patently erroneous. Compare *Goodwin* v. *Oswald*, 462 F. 2d 1237, 1248-1252 (C.A. 2) (Friendly, J., dissenting).

While the prohibition adopted by the court of appeals may permit the discovery of clearly discernible

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[29] *A propos* the suggestion that introduction of contraband by attorneys is a remote possibility, we note that the weapon used during the escape attempt by convict George Jackson, which led to the slaying of three California prison guards, may have been brought into the prison by his attorney. See *New York Times*, August 23, 1971, p. 1. We understand that the attorney has since been indicted for this action, although he has not yet been apprehended.

[30] It would be particularly burdensome and costly in the federal prison system, because any given institution contains inmates from all parts of the country, who are represented by attorneys throughout the country. Apart from expense,

contraband, it makes no provision for items not capable of detection by physical manipulation of an envelope or by scientific means. These articles include narcotics, chemicals and money. The Bureau of Prisons has conducted extensive research with devices such as metal detectors, fluoroscopes and x-ray type devices, with a view towards facilitating inspection of inmate correspondence. To date, however, none of these devices has proven sufficiently reliable to replace physical inspection of mail.[21]

We submit that the extent of the inspection provided for by federal prison rules strikes a permissible balance between an inmate's right to correspond with counsel and the practical needs of prison officials to maintain some control and surveillance over materials entering the prison. Accordingly, to the extent that the court of appeals' decision would bar even the limited inspection practices of the Bureau of Prisons, it is unsound and warrants reversal by this Court.

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the difficulties in reaching busy criminal lawyers, so often in court, would be exacerbated by cross-country time changes.

[21] We are informed by the Bureau of Prisons that metal detectors are not yet sufficiently sophisticated to detect various type of weapons with complete assurance and that x-ray machines, though capable of detecting items having a solid mass, are not reliable for detection of items such as narcotics or currency.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed or modified in the respects discussed above.

Respectfully submitted.

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APPENDIX

A. The Early American Prison System and Disciplinary Procedures

The contemporary prison system is of relatively recent origin, and its underlying theories and practices are in, and are the result of, constant evolution. The role of institutional discipline is integrally involved in this evolutionary process, as the mechanisms and ends of discipline do not stand separate and apart from the day-to-day operational or treatment programs of the correctional institution but are an essential part of them.

Although jails and prisons had existed in the Colonies for paupers and for the detention of those convicted of minor crimes, punishment—in the form of hard labor and corporal punishment—was viewed as the principal means (along with execution) of deterring serious criminal behavior. Tappan, *Crime, Justice and Correction* 601-605 (1960). Discipline and order were generally lacking within the early colonial custodial facilities.

The requirement of discipline or good order in prisons has the same historic roots as the development of the prison as a tool in combatting crime. The first American penitentiary was established in Philadelphia, in 1790, in the Walnut Street Jail, where the use of imprisonment in solitary confinement was established as the prevailing method of punishing and deferring crime. Erected within the yard of the old jail, the penitentiary contained 24 in-

dividual cells for the confinement of the more hardened offenders. *Id.* at 605-606. These cells served as isolated, segregated, places where penitence might be extracted from those confined.

Prior to 1829, under what came to be known as the "Pennsylvania System," the prisoner was continuously confined to a solitary cell without permission to labor. For several years thereafter, inmates were permitted to work alone in complete solitude; all communication, with the exception of religious advisors and official visitors, was forbidden. This regime denied the prisoner all knowledge of anything that took place beyond the walls of the prison. See Wilson, *The Crime of Punishment* 219-220 (1931). Thus, in these early times the essence of imprisonment for crime was total segregation.

While the Pennsylvania system was developing, the State of New York experimented with a similar system of solitary confinement. The effect on the prisoners, however, proved too severe. As a result of this experience, New York developed a compromise solution known as the "Auburn" or "silent" system, in which the inmates were employed in congregate shops during the day under a strict rule of silence and placed in solitary confinement during the night. Tappan, *supra*, at 609-610. Prisoners were marched to work in a military lock-step, with their eyes cast on the guard during the march and on their work while in the shop. Violations of any of these rules resulted in immediate infliction of corporal punishment by the guards.

While the lack of disruption commended the Auburn system to officials in other states, the severe methods of control also resulted in substantial criticism. As one observer noted in commenting on the New York approach:

> Yet with all these advantages I cannot offer this system for adoption; and my chief objection arises from the means employed to procure them. It is by the lash, put into the hands of the keeper, to be used at discretion, and by a power strangely I think declared to be legally vested in the turnkey. The objections to this system are obvious. And first, the anomaly presents itself, not to call it by a harsher name, of permitting a punishment to be inflicted at the discretion not only of a man at the head of the institution, but by his under officers, at their discretion, and that too for disrespect, or the vague charge of disobedience, which punishment the law has abolished as too ignominious, unequal, and cruel, to be inflicted by the court for dangerous crimes. [Livingston, *System of Penal Law, Introductory Report to the Code of Reform and Prison Discipline*, p. 8 (1828).]

The abuses of the Auburn system prompted some states adopting its general approach to place limitations on the application of physical punishment. In Massachusetts, no punishment could be inflicted for any offense by an inferior officer or by any other authority than the administrator of the prison, "who after deliberate hearing and consideration of the complaint and the defense, at the end of the day's work may cause stripes to be inflicted in his own

presence * * *." Gray, *Prison Discipline in America* (1848), reprinted in *Reports of the Prison Discipline Society, 1846-1854*, vol. III, at 6-9 (1855). Punishment in the Massachusetts institution was limited to those "absolutely requisite * * * for the preservation of good order." *Id.* at 13. Massachusetts was also instrumental in developing programs of secular and religious education and recreation, and counseling services for discharged prisoners. Tappan, *supra*, at 610.

In the years following the Civil War, the controversy regarding the Auburn and Pennsylvania systems for maintenance of order and discipline dissipated. The rigid rules of silence and solitary confinement were replaced by relative freedom of association and communication. The small solitary cells were replaced with larger, more well-lit units. The innovations commenced in the Massachusetts system led to the development of treatment and guidance programs. *Id.* at 611.

Disciplinary practices, however, did not evolve quite so rapidly. Until well into this century corporal punishment, through the use of the lash, shackling or cuffing to the bars, cold baths, and gagging, continued to be used in state institutions as a means to enforce discipline. See Attorney General's Survey of Release Procedures, Vol. 5, p. 122 (1940). See also *Jackson* v. *Bishop*, 268 F. Supp. 804 (E.D. Ark.), reversed in part, 404 F. 2d 571 (C.A. 8) (holding corporal punishment to be cruel and unusual punishment in violation of the Eighth Amendment).

Until recently, discipline was frequently meted out in a prompt and arbitrary fashion, at the location of the infraction or after the offender received a *pro forma* "write-up." However, increased awareness on the part of correctional officials of the effects of unsupervised, unregulated and erratic disciplinary practices, coupled with increased judicial concern for the rights of the confined, has resulted in a redefinition of institutional disciplinary procedures. See South Carolina Department of Corrections Collective Violence Research Project, *Inmate Grievance Procedures* 24 (1973). The federal prison system has been a leader in this change.

B. The Origin and Development of the Federal Bureau of Prisons and of its Rules for Disciplinary Proceedings

1. *Historical development.* Prior to the turn of the century, federal prisoners were generally incarcerated in state and local facilities. In the 1890's, the growing number of federal inmates, coupled with demands from reform groups that the federal government assume more responsibility in this area, led to the creation of separate federal facilities. Tappan, *supra*, at 619.[1] Between 1905 and 1930, the federal government established five correctional institutions.[2]

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[1] Tappan states that in 1885 there were over 1,000 federal prisoners in state prisons and approximately 10,000 in county jails. *Ibid.*

[2] The first federal prison was built at Leavenworth, Kansas, and was opened in 1905. Atlanta Penitentiary was opened later that year, followed by McNeil Island Penitentiary (pre-

The Superintendent of Prisons in the Department of Justice had only nominal control over these institutions. The Superintendent's staff was small and their resources limited; as a result they could neither inspect nor supervise the prisons adequately. Bureau of Prisons, *Thirty Years of Prison Progress* 4-5 (1961). For all practical purposes the federal institutions were under the control of their respective wardens. Responsibility for inmate assignments and discipline was delegated to the deputy wardens. Discipline in the early years of the federal prison system was administered in an authoritarian fashion, with penalties varying in harshness from several days in isolation on bread and water to forfeiture of all good time credit. An inmate who protested such penalties risked being shackled to his cell bars. *Ibid.*

Congressional concern for the lack of unified authority in the management of federal institutions led to the creation of the Federal Bureau of Prisons in 1930.[8] The enabling legislation (46 Stat. 325; see

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viously a territorial jail) in 1909. In 1926, the first federal reformatory was opened in Chillicothe, Ohio, and the following year the first prison for women was completed at Alderson, West Virginia. Huston, *The Department of Justice* 204-206 (1967).

[8] As noted by the report of the House Judiciary Committee:

"Heretofore, there has not been a sufficient coordinating force at the seat of government to direct the many problems connected with the administration of our prisons, the education and welfare of the inmates, the industrial activities in our prisons and the care and treatment of Federal prisoners in the 900 local jails distributed

18 U.S.C. 4042) set forth the duties of the Bureau, which included:

> the management and regulation of all Federal penal and correctional institutions and * * * [responsibility] for the safe-keeping, care, protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States * * *.

During its initial two decades, the Bureau of Prisons issued no formal guidelines regarding the discipline of inmates. However, there developed, under the supervision of the Director's office, a procedure whereby reports of inmate misconduct were presented to a committee at each institution (frequently called the Adjustment Committee) for disposition. The committee, which was generally composed of high-level staff members, had a broad range of dispositional alternatives, including placement in segregation or forfeiture of accrued good time.[4] Corporal punishment was forbidden. See *Jackson* v. *Bishop*, *supra*, 268 F. Supp. at 813-814.

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throughout the country." (H. Rep. No. 106, 71st Cong., 2d Sess., p. 2 (quoting statement of Attorney General)).

Companion legislation provided for the establishment of federal prison industries (46 Stat. 391) and the construction of two additional correctional facilities (46 Stat. 1574).

[4] We are informed by James V. Bennett, Director of the Bureau of Prisons from 1937 to 1964, that the Bureau's policy in this regard was imparted to field administrators by the following means:

In 1954, the Bureau issued its first formal statement regarding discipline of federal prisoners. In a memorandum directed to all wardens and superintendents, Director Bennett stated that, following a report of misconduct, an inmate could be placed in segregated status awaiting action by the disciplinary committee for no longer than two days. The prisoner could be placed in isolation for punishment only after a finding by the disciplinary committee (composed of at least three staff members) that there had been a violation of institutional rules. The committee could commit the inmate to isolation for an indeterminate period, but he could not be held beyond ten days without specific written approval of the warden. All prisoners placed in isolation were to be visited at least once each day by the institution physician and an associate warden, and at least hourly by a custodial officer. Bureau of Prisons, *Policies Regarding Punishment of Prisoners*, issued November 4, 1954.

The current philosophy and practice of the Bureau—which include significantly greater procedural

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(1) In the course of periodic inspections of institutions, the Director would review the proper disciplinary procedure to be employed.

(2) Discussion of appropriate disciplinary practices was a part of the agenda of the yearly wardens' conference.

(3) In reviewing misconduct reports where a loss of accrued good-time occurred or the disciplinary action taken was substantial, the Director would indicate the Bureau's policy if the procedures employed deviated from required norms.

protection for the prisoner than in 1954—derive largely from a study of its institutional policies and practices relating to discipline undertaken by the Bureau in 1965 "in recognition of the fact that this has been a relatively neglected area of Prison Service administration." Bureau of Prisons, *Report of Findings Relating to Disciplinary Policies and Practices* (1966). The report found discipline to be essential to the objectives of the institution generally, *i.e.*, security and control, efficient and economical management, and a purposeful program of coordinated rehabilitative activities.[5] Specifically, the report reviewed the basic objective of any disciplinary measure as being an attempt to achieve future voluntary acceptance by the inmate of the institutional limitations imposed upon him, with the ultimate goals being self-discipline and freedom from incarceration.

The report (1) delineated a framework within which to achieve the objectives of effective discipline;[6]

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[5] Reflecting these objectives, the report adopted the following guidelines (*id.* at 2):

> We accept as our responsibility that a prisoner shall not be damaged physically, mentally or morally by the experience of confinement. We also believe in making practical use of every available resource in trying to understand the inmate as a problem human being and in helping him find, while in our institutions, the means of successful community life following release. Discipline has to do with but one aspect of his adaptation to the institution and its programs.

[6] The principles outlined were (*id.* at 3):

> 1. Disciplinary action shall be taken only at such times

(2) reaffirmed, as the basic authority for the administration of inmate discipline, the use of the Adjustment Committee consisting of at least three members (frequently an Assistant Warden, Chief of Classification, and a third member from the medi-

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and in such manner and degree as is necessary to regulate an inmate's behavior within acceptable limits.

2. Inmate behavior must be controlled in a completely impersonal, impartial and consistent manner, with due regard for the objectives of effective discipline and the inmate's capability and willingness to conform to expectations.

3. Disciplinary measures shall never be capricious, in the nature of retaliation or revenge, nor applied for any purpose other than the control and correction of the inmate involved.

4. Group restrictions of penalties shall not be imposed as a means of discipline for the misconduct of an individual.

5. Corporal punishment of any kind is strictly prohibited.

6. Appropriate disciplinary action should be taken as soon after the commission of an offense as circumstances permit.

7. All inmate misconduct shall be reported, thoroughly investigated and complete record maintained of disciplinary action taken.

8. Both punishment and incentives are essential elements of effective control. Both shall exist simultaneously and should be proportionate.

9. However important an act of misconduct, the administration of discipline is concerned with the inmate's total adaptation to the institutional community. Disciplinary action should be visible to other inmates and staff.

10. It is the responsibility of management to evaluate the circumstances of inmate misconduct to the end that constructive and preventive measures will be taken, where possible, before misconduct occurs.

cal or educational staff);[7] and (3) indicated that different procedures should be employed with respect to the more severe punishments, such as forfeiture of accrued good-time. *Id.* at 10. See generally Richmond, *Prisoner Management And Control* (1969).

Based upon this review of institutional discipline, the Bureau of Prisons issued two policy statements in 1966 adopting the proposed objectives and procedures. One statement concerned "Inmate Discipline" in general (Bureau of Prisons, Policy Statement 7400.5, issued November 28, 1966), and the other was specifically directed at "Withholding, Forfeiture, and Restoration of Good Time" (Bureau of Prisons, Policy Statement 7400.6, issued December 1, 1966). As a result of a continuing process of internal review and assessment of operations thereunder, these policy statements have each since been revised at least once, the current versions of the "Good Time" and "Inmate Discipline" statements having been issued in 1971 and 1972, respectively.

2. *Current procedures for inmate discipline other than loss of good time.* Under the most recent "Inmate Discipline" policy statement (7400.5B issued June 6, 1972), administration of discipline is vested in the Adjustment Committee, or Treatment Team,[8]

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[7] It was felt that with this composition, the Adjustment Committee reflected a "conscious effort on the part of institutional administrators to place this important responsibility in the hands of personnel who are most competent, who broadly represent all areas of institutional operations * * *." *Id.* at 4.

[8] The Treatment Team is the counterpart of the Adjustment Committee in some institutions.

as a sub-committee of the Classification Committee at each institution. The ultimate purpose which the Adjustment Committee's actions are to serve "is to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the programs, behavior standards, and limitations imposed by the administration; and, (b) the general welfare and safety of the institutional community." *Id.* at 1.

These overriding purposes are further delineated in a number of "essential principles" by which disciplinary action is to be governed,* in recognition of the fact "that disciplinary sanction is but one factor

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* The principles are as follows (*id.* at 1-2):

(1) Disciplinary action shall be taken at such times and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits.

(2) Inmate behavior must be controlled in a completely impersonal, impartial and consistent manner.

(3) Disciplinary action shall not be capricious nor in the nature of retaliation or revenge.

(4) Corporal punishment of any kind is strictly prohibited.

(5) The determination of disciplinary measures against any inmate is the responsibility of the Adjustment Committee and/or Treatment Team. Limited action in minor infractions, as defined by the head of the institution, may be delegated when supervised and controlled by the Adjustment Committee.

(6) Disciplinary action shall be taken as soon after the occurrence of misconduct as circumstances permit.

(7) It is essential that inmate case records reflect misconducts, dispositions and include interpretive and evaluative statements regarding them.

in correctional treatment and control and that, as applied to an inmate who has misbehaved, the objective is his future voluntary acceptance of certain behavior limitations which are being imposed upon him." *Ibid.*

The principal disciplinary functions of the Adjustment Committee are to receive reports of misconduct, hold hearings, make findings, impose disciplinary actions, and, where indicated, to refer violators for diagnosis or special handling. *Id.* at 7. Disciplinary action is to be "individualized in keeping with such factors as the offender's past history, institutional adjustment, motivation, and attitude." *Id.* at 6.

The Committee has access to a broad range of dispositional actions. It may exonerate the inmate; refer him to various institutional program and service resources; reprimand him; subject him to certain restrictions; withdraw certain privileges; remove him from certain programs, job assignments, or quarters; order him to be segregated; [10] release him from segregation with time served; continue him in segregation with further review at a later date; order him re-

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[10] Inmates may also be segregated "for the purpose of insuring immediate control and supervision when it is determined that they constitute a threat to themselves, to others, or the safety and security of the institution * * *." *Id.* at 2. Additional purposes served by segregation are to protect potential victims, to insure witnesses against intimidation, and to support those who lack sufficient strength to live in the prison community. *Id.* at 9. Regardless of the purposes of the segregation, detailed rules have been adopted to implement the policy that "[b]asic living levels of decency and humane treatment must be maintained * * *." *Id.* at 9-11.

turned to the general population; recommend transfer to another institution; recommend (but not impose) the withholding or forfeiture of good time.

The choice of the appropriate disposition should be "a composite group judgment which takes cognizance of the reasons for the adverse behavior, the setting and circumstances in which it occurred, the involved inmate's accountability, and the correctional program goals set for him. The choice of disposition goes far beyond mere compliance with regulations. To be fully effective, the inmate must understand and accept the reasonableness of the limitations being imposed upon him." *Id.* at 7.

With respect to serious disciplinary measures other than an actual forfeiture of good time (which we discuss below, pp. 16a-21a, *infra*), the policy statement (as revised in 1972) establishes detailed procedural requirements governing the actions of the Adjustment Committee.[11]

An inmate charged with misconduct is advised of the specific charges [12] by a staff member (other than

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[11] For minor violations of the rules, limited disciplinary action may be taken by a screening officer. Records of such violations must be maintained and such disciplinary actions are reviewed by the Chairman of the Adjustment Committee. *Id.* at 9.

[12] This policy statement includes sections which set forth the rights and responsibilities of federal inmates and a list of prohibited acts. *Id.* at 3-6. At the time of his arrival at the institution, the prisoner is advised in writing of acts prohibited in the institution and of the types of disciplinary action that may be taken.

the reporting officer) and is given an opportunity to state his version of the incident. If the inmate has been placed in segregation, investigation of the report of misconduct must be completed by the staff member, and the inmate given written notification of charges, within 24 hours thereafter. The matter is then referred to the Adjustment Committee, which meets at least three times a week.

When the inmate is called before the Committee (of which neither the reporting nor the investigating officer shall be a member), he is again advised of the charges and asked for a statement with reference thereto. If the inmate denies the charges or the Committee has some doubt about them, the matter may be referred back for further investigation. Witnesses may be called by the Committee, but they are not available for cross-examination. The Committee's determination is based on a review of the misconduct report, the results of the investigation, and any pertinent information or statement presented at the hearing. The Adjustment Committee report, a copy of which is provided to the inmate, must clearly state the offense, place and time of occurrence, and witnesses; it must also include a clear statement of the conclusions of the Committee as to the inmate's involvement in the prohibited act, the information upon which the conclusion is based, and the Committee's disposition. Finally, the inmate must be advised in writing of the Committee's decision. *Id.* at 7-8.[13]

[13] We are advised by the Bureau of Prisons that, while the Committee exercises its discretion as to whether all evidence

3. *Current procedures for withholding and forfeiture of good time.*[14] In recognition of the potentially more substantial impact on individual interests of a forfeiture of good time, the original 1966 policy statemen provided that the Adjustment Committee could recommend forfeiture or withholding of good time (subject to the approval of the Chief Executive Officer of the institution) only after satisfying specified procedural requirements which were not then required as to other modes of discipline.

Under the current procedures, in cases where a forfeiture of good time (or the withholding of good time credits for more than one month[15]) may be appropriate, the matter is referred to a special com-

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is disclosed to the inmate, its report will indicate the fact that the Committee has relied on undisclosed evidence where that is the case.

[14] Although the issue of due process protections in this context is not directly before the Court (see p. 18, *supra*) we refer to the matter to provide more complete background about the Bureau of Prisons' rules and to illustrate how, for the more serious and less frequent hearings concerning loss of good time, more elaborate procedures have been adopted than for other disciplinary measures.

[15] A recommendation by the Adjustment Committee that good time be withheld, as opposed to forfeited, may be acted on by the Chief Executive Officer without the further action of the Board. The policy statement provides that withholding should not necessarily apply automatically to inmates in segregation status and, in any event, is limited to the time creditable for the month in which the violation occurred. Withholding of a greater amount of good time is to be handled by forfeiture proceedings. Bureau of Prisons, Policy Statement 7400.6A, issued August 13, 1971, p. 1.

mittee established for this purpose, called the Good Time Forfeiture Board.[16]

The procedures now required (Bureau of Prisons, Policy Statement, 7400.6A, "Withholding, Forfeiture, and Restoration of Good Time," issued August 13, 1971, pp. 1-2) may be summarized as follows:

1. The inmate is called before the committee and advised of the details of the report of misconduct and of the rules of procedure to be followed by the committee.[17]
2. If the inmate admits that the allegations of misconduct are true, no further evidence need be heard, but the inmate is permitted to offer a statement in mitigation to be considered by the Board in making its recommendations.
3. If the inmate does not admit the misconduct, he is advised that he can have a member of the staff assist him at the hearing. If he so wishes, the inmate may submit the name of a full-time staff member. The Chairman, with the consent of the designated staff member, arranges for this person to represent the inmate. If the staff member chosen declines or is not available because of absence from the institution, the inmate is given the option of

[16] We are informed by the Bureau of Prisons that the Board, like the Adjustment Committee, does not include the reporting or investigating officer.

[17] If it appears at any time to any member of the Board that the inmate may be mentally ill, the Chairman should refer the inmate to the medical staff for a determination of whether the inmate is incompetent, within the meaning of 18 U.S.C. 4244. Good time shall not be forfeited in the case of an inmate who is determined to be incompetent. *Id.* at 1-2.

choosing another representative or, in the case of an absent designee, of waiting for a reasonable period until his return. The Chairman recesses the hearing to permit the representative to interview the inmate and to prepare the inmate's presentation.

4. Formal rules of evidence and of trial procedure do not apply to the hearing. The Chairman arranges for the presentation of the evidence supporting the misconduct report. Any member of the Board can request that the Chairman arrange for additional investigation or evidence, or for the appearance of additional witnesses, or for the statements of unavailable witnesses. The Chairman may determine that the source of certain information should not be revealed to the inmate, *e.g.*, when disclosure may endanger the safety or well-being of another person. In such a case, the report of the Board should summarize the circumstances and the reasons for this determination. Otherwise, all evidence heard or seen by the Board is made known to the inmate (and his representative).
5. After the evidence supporting the misconduct report is heard, the inmate or his representative is permitted to make a statement. The inmate can request witnesses on his behalf. The Chairman will call those witnesses (staff or inmates) who are available, and who are determined by him to be necessary for an appreciation of the circumstances. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements. The Chairman must note in the Board's report the reasons for declining to call requested witnesses.

6. The inmate and his representative are permitted to make a final statement on his behalf.
7. The Board members discuss the case, deciding upon the findings of fact that are supported by the evidence, and upon the recommendations to be made to the Chief Executive Officer.
8. A written report is submitted to the Chief Executive Officer, containing a record of the proceedings and evidence (a verbatim transcript need not be made, but the record of the hearing should summarize all aspects of the proceedings and the facts presented before it), and the recommendations of the committee, including reasons stated as specifically as possible. Any member of the Board can submit a minority report.[18]
9. The Chief Executive Officer reviews the report of the Board and makes an endorsement on the report, accepting or rejecting the Board's findings, and ordering a forfeiture if warranted by the evidence and if appropriate under all the circumstances.[19]

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[18] We are advised by the Bureau of Prisons that the report indicates whether information not disclosed to the inmate has been relied upon.

[19] The good time available for forfeiture consists of an amount computed by multiplying the number of months served at the time of the offense for which forfeiture action is taken times the applicable monthly rate specified in 18 U.S.C. 4161 (less any previous forfeiture and withholding outstanding), plus any extra good time which may have been earned to the date of the offense. As to extra good time, see Bureau of Prisons, Policy Statement 7600.15, "Industrial and Camp

10. A copy of the report of each forfeiture proceeding and of the Chief Executive Officer's decision is forwarded to the Office of General Counsel and Review of the Bureau of Prisons. The Chairman of the Classification Committee, or his designated representative on that Committee, informs the inmate of the decision of the Chief Executive Officer, and provides him with a copy of the written report and the decision of the Chief Executive Officer. The inmate is advised that this decision can be appealed to the Office of General Counsel and Review through the Prisoners' Mail Box. The inmate is permitted to confer in this regard with the staff member who represented him at the hearing.

Upon administrative review of a forfeiture of good time, consideration is given to whether (1) there has been compliance with the procedural requirements; (2) the decision has a substantial factual basis; and (3) the amount of time forfeited is proportionate to the violation and other circumstances. *Id.* at 3-4.

The restoration of good time is regarded as a valuable instrument of case management, and authority to restore both withheld and forfeited good time, in whole or in part, is delegated to the Chief Execu-

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Good Time" (issued August 1, 1955); Bureau of Prisons, Policy Statement 7600.50A, "Meritorious Good Time and Meritorious Service Awards," issued February 23, 1971; Bureau of Prisons, Policy Statement 7600.50B, "Extra Good Time," issued February 16, 1972. See also 18 U.S.C. 4126, 4162.

tive Officer of each institution. *Ibid.* The rules governing restoration vary depending upon the nature of the institution (*e.g.*, those for long-term adult offenders, youth corrections, etc.).

4. *Development of a prisoner grievance procedure.* The carefully considered, gradual development of more elaborate procedures concerning prison discipline is being paralleled by the recent institution of an administrative remedy procedure in federal prisons by which inmates may be assured of prompt action on their grievances.[20] See generally Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1128 (1973). Based on the successful operation of a program instituted in 1973 on a pilot basis in three institutions,[21] this program became effective in all fed-

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[20] Under the new procedure, an inmate who cannot resolve his complaint through informal contact with the staff may file a formal complaint for administrative remedy. He may obtain assistance from other inmates or from institution employees in completing the form. The complaint is then given to a designated staff member, who provides the inmate with a signed receipt. The institution staff has fifteen working days to act upon the matter and provide a written response to the inmate. When the complaint is of an emergency nature and involves an alleged threat to the inmate's health or welfare, reply must be made within 48 hours from the receipt of the complaint. If the inmate is not satisfied with the institution's response, he may file an appeal to the Director of the Bureau of Prisons through the Prisoners' Mail Box. A receipt for his appeal will be sent to the inmate, and the Director has 30 days to reply. Bureau of Prisons, Policy Statement 2001.6, "Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities," issued February 14, 1974.

[21] The pilot project has demonstrated that such a procedure can be responsive to inmate complaints. During the first four

eral institutions on April 1, 1974. Such a procedure may well not only reduce the burden imposed on federal courts by suits reflecting prisoners' grievances,[22] but also may reduce the frequency and intensity of inmate-staff confrontations and attendant inmate mis-

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months of the pilot program (September 1 to December 31, 1973), inmates at the three institutions filed 164 complaints, of which 35 percent were determined in the inmates' favor. Of the total number of complaints, at least 26 related to disciplinary matters. A total of 27 appeals were filed with the Director, 23 percent of which were successful.

[22] Federal and state prisoners have turned increasingly to federal courts to complain about sentences, conditions of confinement, and personal inconveniences incidental to incarceration. As Chief Justice Burger recently observed:

> Twenty years ago complaints filed in federal courts by prisoners in state prisons were hardly enough to give any concern. In fiscal 1972, there were more than sixteen thousand petitions of various kinds filed challenging the validity of the conviction even after full review by other courts. In addition, prisoners have filed more than four thousand cases under the Civil Rights Act claiming mistreatment or denial of rights. [Burger, *supra*, 59 A.B.A.J. at 1128.]

A similar increase in litigation has been noted with respect to actions filed by or on behalf of federal prisoners. See Annual Report, Administrative Office of United States Courts, Part II (1973), 27-29. A number of these state and federal prisoner cases have challenged, as respondents have below, procedures employed in prison disciplinary actions.

conduct, thereby reducing the number of occasions requiring disciplinary action.[23]

[23] According to a recent study (South Carolina Department of Corrections Collective Violence Research Project, *Inmate Grievance Procedures, supra*, p. 8):

> Those state prisoners randomly sampled in preparation of this monograph, uniformly placed the lack of adequate means of communication with decision-making correctional staff and the absence of established procedures for venting grievances, as the primary causes of prison unrest. Perhaps the ever-increasing spate of institutional disturbances that highlight specific lists of inmate grievances gives some support to this generally held belief.

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Supreme Court
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APR 15
MICHAEL RODAK, J.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-679

CHARLES WOLFF, JR., *et al.*,

Petitioners,

vs.

ROBERT O. McDONNELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, *AMICUS CURIAE*

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, *AMICUS CURIAE*

Interest of *Amicus**

The Legal Aid Society is a non-profit organization incorporated under the laws of the State of New York for the purpose of providing legal assistance to persons too poor to afford the services of legal counsel.

* Letters of consent have been obtained from respondents' counsel and the Attorney General of the State of Nebraska, and are on file with the Clerk of the Court.

In September, 1971, the Society established a special litigation unit, the Prisoners' Rights Project, to protect the rights of prisoners in New York State. Since its inception, the Project has represented prisoners in a substantial amount of prison reform litigation in both state and federal courts. Project attorneys frequently visit New York prisons and receive a vast quantity of correspondence from prisoners and parolees.

Based on the Project's experience with New York's correctional system, *amicus* believes that the procedures by which prison discipline is imposed are of the utmost concern to the inmate population. As will be established in this brief, prison disciplinary action can affect not only the nature but also the duration of a prisoner's confinement. Accordingly, there is a critical need for sufficient procedural safeguards at disciplinary hearings in order to insure the fair imposition of prison discipline.

The purpose of this brief is to assist respondents in persuading the Court that the Fourteenth Amendment requires the same rudimentary procedural safeguards at prison disciplinary proceedings as were applied to parole revocation proceedings in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). In support of our constitutional argument we will endeavor to convey to the Court what we have learned from our involvement with the New York prison system—an involvement which has led us to conclude that the procedural protection afforded by *Morrissey* and *Gagnon* is necessary to protect the interests of both the inmate and prison administration.

Amicus will not discuss the other issues in this case as we have not experienced substantial difficulties in these areas in New York State. As to each of these issues, however, we fully support the position of respondents.

Summary of Argument

The Court has frequently recognized that only through the application of traditional due process safeguards is accurate fact-finding insured and arbitrary governmental action avoided. In recent years, it has been established beyond a doubt that prisoners, like all citizens, are entitled to the protection of the Due Process Clause. Accordingly, rudimentary procedural protection should be afforded prisoners prior to the imposition of prison discipline.

Disciplinary action can cause a prisoner "grievous loss" by substantially altering both the nature and duration of his confinement. The prisoner's interest in avoiding that loss outweighs any interest the prison administration has in summary adjudication. Indeed, due process protection at prison disciplinary hearings would operate to promote, rather than defeat, the institutional goals of security and rehabilitation and would not present an unmanageable administrative burden.

Although the lower courts have been in agreement that fair disciplinary proceedings are constitutionally required, some courts have held that the particular safeguards of confrontation, cross-examination, counsel and the right to call witnesses are not necessary to insure fairness. However, factual disputes are as likely to occur in prison dis-

ciplinary hearings as in other adjudicatory settings, and in such cases a fair inquiry into the facts cannot be had in the absence of these safeguards. Furthermore, the peculiar nature of prison society creates a real possibility for abuse of the disciplinary process.

The minimum procedural requirements of the Due Process Clause have historically been the best techniques for discovering truth and insuring objective decision-making. In the context of prison disciplinary hearings, these requirements should include (a) prior written notice of the charges; (b) an impartial tribunal; (c) the opportunity to confront and cross-examine adverse witnesses and to call witnesses in one's own behalf; (d) representation by counsel and counsel substitute; and (e) a written statement of the evidence relied on and reasons for the decision.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires that a prisoner be afforded basic procedural protection prior to the imposition of prison discipline.

I.

As recently as ten years ago, the customary judicial response to inmate allegations of mistreatment was to withhold relief in deference to the discretion of prison administrators.[1] At that time, for all practical purposes, the

1. *E.g., McCloskey* v. *Maryland*, 337 F. 2d 72, 74 (4th Cir. 1964); *Kostal* v. *Tinsley*, 337 F. 2d 845, 846 (10th Cir. 1964).

Constitution did not exist within prison walls. Today, however, after a decade of judicial decrees protecting the rights of those in custody, "it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities." *Washington* v. *Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), aff'd 390 U.S. 333 (1968). As the Court stated in *Johnson* v. *Avery*, 393 U.S. 483 (1969):

> There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights the regulations may be invalidated. 393 U.S. at 486.

Lower courts have not hesitated to intervene in internal prison affairs to protect prisoners from arbitrary, capricious or discriminatory treatment. The Due Process Clause has thus been invoked in prison cases to provide protection against discriminatory and arbitrary infliction of "grievous loss" upon prisoners by their keepers. *Palmigiano* v. *Baxter*, 487 F. 2d 1280 (1st Cir. 1973); *U.S. ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (7th Cir. 1973); *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*en banc*), *cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), the specific requirements for minimum due process were made appli-

cable to parole revocation proceedings. Although *Morrissey* marked the first instance where the Court extended such procedural protection to individuals in custody, that decision is but another statement of the Court's frequent recognition that only through traditional due process safeguards is accurate fact-finding insured and arbitrary governmental action avoided. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Thus, the Court's statement in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1970): "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule of law and rule by fiat."

On numerous occasions this Court has described due process as a flexible concept. "[I]ts exact boundaries are undefinable and its content varies according to specific factual contexts." *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960). The flexibility of the standard was thus articulated in *Goldberg*:

> The extent to which procedural due process must be afforded the [individual] is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring), and depends upon whether the [individual's] interest in avoiding the loss outweighs the governmental interest in summary adjudication. 397 U.S. at 262-63.

In applying this test to prison disciplinary hearings it becomes clear that prior to the imposition of any discipli-

nary sanction an inmate should at least be afforded the rudimentary procedural safeguards set down in *Goldberg*. These safeguards include (a) prior written notice of the charges; (b) an impartial tribunal; (c) the opportunity to confront and cross-examine adverse witnesses and to call witnesses in one's own behalf; (d) representation by counsel and counsel substitute; and (e) a written statement of the evidence relied on and reasons for the decision. As will be established herein, only through the application of these safeguards will the interests of both the inmate and the prison administration be protected.

II.

There can be no doubt that an inmate who is charged with a violation of institutional rules is threatened with a "grievous loss" within the meaning of *Goldberg*. While it is obvious that inmates do not enjoy all the liberties of free persons, any liberties which they retain thereby achieve a greater significance. *Palmigiano* v. *Baxter, supra,* 487 F. 2d at 1284; *U.S. ex rel. Miller* v. *Twomey, supra,* 479 F. 2d at 719. Thus, their interest in fair disciplinary proceedings cannot be minimized. As Professor Goffman has observed:

> In general, the punishments meted out in total institutions are more severe than anything encountered by the inmate in his home world. In any case, conditions in which a few easily controlled privileges are so important are the same conditions in which their withdrawal has a terrible significance. GOFFMAN, ASYLUMS 50-51 (1961).

In New York, disciplinary decisions greatly affect an inmate's liberty within the prison system. For example, an inmate might be confined at one of seven maximum security institutions or at a medium security institution such as the Wallkill Correctional Facility. At the latter, inmates are permitted far more freedom of movement and have access to many more rehabilitative programs.[2] The determination whether an inmate is a suitable candidate for placement in Wallkill depends in large part on his disciplinary record at maximum security facilities.[3] Furthermore, once an inmate is at Wallkill, a single disciplinary infraction might result in his transfer back to a maximum security institution.[4]

Disciplinary infractions also determine the degree of liberty an inmate may have within his particular institution. Each institution in New York State contains a "special housing unit" where an inmate may be confined for up to sixty days as a result of a serious disciplinary infraction. 7 NYCRR §253.5. In a special housing unit, an inmate is deprived of many of the liberties of prison life. He is

2. See, *Newkirk* v. *Butler*, 364 F. Supp. 497, 500 (S.D.N.Y. 1973):

> [T]he conditions [in the maximum security institutions] contrast strikingly with those in Wallkill. * * * The cells are locked, the guards armed, the access to library and recreational facilities more limited, the space more crowded, and the rehabilitation programs significantly less extensive.

3. Walter Dunbar, former Executive Deputy Commissioner, New York Department of Correctional Services, testified to this fact on November 28, 1972 during the trial of *Newkirk* v. *Butler*, *supra*, n. 2.

4. This practice is described in "The Wallkill Story," a mimeographed public relations pamphlet distributed by the New York Department of Correctional Services.

segregated from the general prison population, confined to his cell for at least twenty-three hours a day, denied participation in educational and industrial programs and denied the opportunity to earn wages.[5]

A third consequence of disciplinary action might be removal from a rehabilitative program such as school, industrial training, work release or furlough. 7 NYCRR §253.5(a)(3). Participation in such programs is generally severely limited. As a result, removal might well mean that the inmate will not receive another such opportunity for months or even years.

In addition to jeopardizing an inmate's institutional liberty and his access to rehabilitative programs, disciplinary infractions also indirectly jeopardize his liberty in the traditional sense by reducing his chances for parole release. In New York, an inmate's disciplinary record is a major factor in determining his eligibility for parole. 7 NYCRR §1.10(a). Indeed, the Board of Parole has, on occasion, postponed an inmate's parole release hearing pending the outcome of disciplinary proceedings against him.[6] On other occasions, the Board has rescinded an unexecuted grant of parole where the potential parolee was

5. As a less severe punishment, an inmate may also be "keep-locked" for up to sixty days. 7 NYCRR §253.5(a)(4). This involves the same deprivations as confinement in a special housing unit except that the inmate is confined to his own cell and thus is not segregated from the inmate population.

6. For example, in July, 1973, the New York State Board of Parole postponed the parole release hearing of James Arnold, an inmate at the Great Meadow Correctional Facility and a client of *amicus*, because of institutional disciplinary charges pending against him. After Arnold was found guilty of these charges, the Board denied parole release and held him for an additional year.

found guilty of a disciplinary infraction after the grant of parole, but before his actual release.[7]

Consequently, inmates possess a significant quantum of liberty which may be threatened by disciplinary action. Unless there exists a substantial countervailing interest on the part of prison administrators, due process requires that there be sufficient procedural safeguards at disciplinary hearings to preclude deprivations of that liberty as the result of inadequate and, at times, biased factual determinations.

Prison administrators generally proffer three basic justifications in support of summary decision-making in the disciplinary process: first, that imposition of discipline is not truly adversarial in nature but merely a component of the rehabilitative and therapeutic scheme of incarceration;[8] second, that a requirement of due process protection prior to punishment would constitute a threat to institutional security;[9] and third, that procedural protection at disciplinary hearings would create a severe administrative burden and result in additional expenditure of public funds.[10]

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7. For example, Reginald Cook, an inmate at the Greenhaven Correctional Facility and a client of *amicus*, was granted parole on October 16, 1973, and was scheduled to be released on November 21, 1973. Prior to the release date, Cook was disciplined for several institutional infractions. On November 15, 1973, Cook was told that the Board of Parole had rescinded his parole and that he would have to wait another four months for release consideration.

8. See, *Braxton* v. *Carlson*, 483 F. 2d 933 (3rd Cir. 1973).

9. See, Brief of Petitioners, p. 28.

10. *Id.* at p. 41.

In light of the decisions of this Court and the writings of correctional authorities, these purported justifications do not withstand analysis. Indeed, it can be shown that due process protection at prison disciplinary hearings is consistent with the interests of prison administrators as it tends to promote, rather than defeat, the goals of security and rehabilitation.

The argument that due process does not apply where adjudicatory proceedings are rehabilitative or therapeutic has been firmly rejected by the Court. In *In re Gault*, 387 U.S. 1 (1967), the Court rejected the invocation of *parens patriae* as justification for withholding procedural safeguards at juvenile proceedings. Similarly in *Morrissey* v. *Brewer, supra*, 408 U.S. 471, the Chief Justice noted that the procedural protections required therein were consistent with the purposes of parole:

> [S]ociety has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness. 408 U.S. at 484.[11]

That fairness operates as a constructive force in rehabilitative efforts has also been recognized by the President's Commission on Law Enforcement and Administration of Justice:

> The necessity of procedural safeguards should not be viewed as antithetical to the treatment concerns of corrections. The existence of procedures both fair in

11. Prior to the *Morrissey* decision, the rehabilitative nature of revocation proceedings had been used as a justification for denying procedural protection. See, *Alverez* v. *Turner*, 422 F. 2d 214, 217 (10th Cir. 1970) (parole revocation hearing need not be adversarial since "the decision to revoke parole is prognostic.").

> fact and perceived to be fair by offenders is surely consonant with the "collaborative regime" emphasized as desirable by modern corrections, in which staff and offenders are not cast as opponents but are united in a common effort aimed at rehabilitation. In a prison no less than in society as a whole, respect for and cooperation with authority requires the guaranty of fairness. President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: CORRECTIONS 13 (1967).

In addition to jeopardizing rehabilitation, the prisoner's impression of disciplinary hearings as unfair may engender such bitterness as to present a threat to prison security. As Chief Judge Coffin has observed:

> [T]he orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly. *Palmigiano* v. *Baxter, supra,* 487 F. 2d at 1283.

Unfair disciplinary methods have in fact been termed one of the major causes of prison riots:

> Readiness to riot results from predisposing causes such as * * * oppressive custodial discipline, sadistic staff quick to write disciplinary charges against inmates, and a general punitive attitude by administration and line personnel. Fox, *Why Prisoners Riot,* 35 FED. PROB. 9, 13 (March, 1971).

It is undisputed that in emergency situations prison officials have the right to act promptly and immediately,

and we do not urge that an administrative hearing is necessary *prior* to the imposition of discipline in such cases. The normal disciplinary case, however, does not occur in an emergency setting. In the ordinary course of prison affairs, administrative hearings would have no detrimental effect on security. Rather, the impression of fairness engendered by such hearings would seem far more likely to prevent inmate disturbances.

The argument that basic due process protection at disciplinary hearings would cause an undue administrative burden and expense may well be illusory. A recent survey of nationwide disciplinary practices conducted by the American Bar Association's Resource Center for Correctional Law and Legal Services[12] indicates that many jurisdictions have not found the burden unmanageable. The survey found that twenty-nine jurisdictions presently allow inmates to call relevant witnesses at disciplinary hearings, twenty-eight allow inmates to cross-examine adverse witnesses and fourteen permit the inmate representation by counsel. While some of these jurisdictions have adopted such safeguards as a result of litigation, others have done so on their own initiative.[13]

However, the question of whether or not procedural due process would cause an administrative or financial burden is without constitutional significance. The Court has re-

12. ABA Resource Center for Correctional Law and Legal Services, *Survey of Prison Disciplinary Practices and Procedures* (April, 1974).

13. See, Kansas Penal System, *Inmate Disciplinary Procedures* (August, 1972); Vermont Department of Corrections, *Disciplinary Regulations* (July, 1972).

jected at every turn arguments that have urged limitations *in the definition* of constitutional rights based upon assertions of unavailable resources by the States. *Goldberg* v. *Kelly, supra,* 397 U.S. at 266; *Harman* v. *Forssenius,* 380 U.S. 528, 542 (1965); *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969); *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965). In short, the meaning of the Due Process Clause does not fluctuate in proportion to the number of persons who seek justifiable refuge in it. The rights afforded by the Constitution are personal rights "which the State must respect, the benefits of which every person may demand * * *. [I]ts safeguards extend to all." *Hill* v. *Texas,* 316 U.S. 400, 406 (1942).

III.

Having applied the *Goldberg* test to prison disciplinary proceedings, the lower courts are in agreement that the inmate's interest in fair decison-making outweighs any governmental interest which would sacrifice fairness. There has, however, been significant disagreement as to precisely what procedural safeguards are necessary to insure fairness in the prison context. *McDonnell* v. *Wolff,* 483 F. 2d 1059 (8th Cir. 1973) [this case]; *Palmigiano* v. *Baxter, supra,* 487 F. 2d 1280; *U.S. ex rel. Miller* v. *Twomey, supra,* 479 F. 2d 701; *Sostre* v. *McGinnis, supra,* 442 F. 2d 178; *Braxton* v. *Carlson,* 483 F.2d 933 (3d Cir. 1973).

Sostre, the leading case rejecting basic procedural protection, involved a disciplinary proceeding in which there had been no real dispute of fact. The only issue concerned the propriety of Sostre's admitted jailhouse lawyering, his refusal to discuss a black liberation group referred to in

his letters and a reference in a letter to his impending "liberation." Upon this record, the court of appeals held that Sostre was entitled to a "minimally fair and rational" inquiry based upon "facts rationally determined." 442 F. 2d at 198. However, the court declined to require the specific due process safeguards of confrontation, cross-examination, counsel, and the right to call witnesses.

Sostre's holding that a "minimally fair and rational inquiry" can be had in the absence of full due process protection has been severely criticized and for good reason. As Professor Millemann has written:

> It is an empty promise to guarantee fairness while omitting the tools necessary to accomplish that fairness. If there is no requirement of due process at a disciplinary hearing, then the proceeding would simply follow this scenario: inmate Jones comes before a disciplinary panel; inmate Jones is told that he has been accused of committing a certain act of misconduct; inmate Jones is asked what "his side of the story is"; and, in the overwhelming number of cases, inmate Jones is told that he is guilty. Without vehicles for discovering truth and insuring objectivity administrative proceedings become a sham and a means for legitimizing arbitrariness. Millemann, *Prison Disciplinary Hearings And Procedural Due Process—The Requirement Of A Full Administrative Hearing*, 31 Md. L. Rev. 27, 50 (1971).

See also, South Carolina Dept. of Corrections, The Emerging Rights of the Confined 108 (1972).

The Second Circuit itself recently cast doubt on the continued vitality of the *Sostre* standard. In a prison

discipline case containing numerous factual disputes concerning the role of certain inmates in the Attica rebellion, the court held that the right to cross-examination as well as to other due process safeguards had not been "inescapably foreclosed" by *Sostre* and noted that in *Sostre*, "we did not state that none of the rejected safeguards were ever to be constitutionally required in any case * * *." *Nieves* v. *Oswald*, 477 F. 2d 1109, 1113 (2d Cir. 1973).

Factual disputes are as likely to arise in prison disciplinary hearings as in any other adjudicatory setting. When such disputes occur, it is virtually impossible for an inmate to establish innocence at a hearing conducted in accordance with the *Sostre* standard. For example, in July of 1973, three inmates at the Great Meadow Correctional Facility were accused by another inmate of having raped him. Institutional disciplinary hearings were held where each of the three denied this serious charge and named alibi witnesses to establish that each was not even present at the time and place of the alleged rape. Each also requested an opportunity to confront and cross-examine the inmate levelling the accusation and to be permitted representation by counsel. In accordance with the rules governing prison disciplinary hearings in New York State,[14] all of these requests were denied, no witnesses were called, and the three prisoners were disciplined solely on the basis of the accusing inmate's written allegations.[15]

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14. 7 NYCRR, Ch. V, pt. 253.

15. Superintendent's Proceedings of James Arnold, Joseph Elfe and Neurha Short, Great Meadow Correctional Facility, Comstock, New York, July 31, 1973. These facts are the subject of a civil rights action, *Elfe, et al.* v. *Preiser, et al.*, 73 CV 482, filed by the Prisoners' Rights Project in October, 1973, in the United States District Court for the Northern District of New York.

In a second case, an inmate at the Ossining Correctional Facility was charged with challenging a correction officer to a fight. At the disciplinary hearing, the inmate pleaded not guilty and submitted a list of five inmate witnesses whom he wished to have testify. Each of these witnesses would have corroborated the inmate's story that the officer had provoked the incident by pushing the inmate without any justification or provocation. As in the previous example, the witnesses were not permitted to testify and the inmate was found guilty solely on the basis of the officer's written report.[16]

In each of these examples, the inmates faced with disciplinary action were left with "a reasonable opportunity to explain [their] actions" [*Sostre* v. *McGinnis, supra,* 442 F. 2d at 198] as their only means of defense. In the first example, this explanation could only be a declaration that they did not know anything about the incident in question. In the second, any explanation would necessarily involve asking the prison disciplinary board to believe the word of a single inmate over the word of a correctional officer. There can be little question that both of these defenses are of minimal worth.

In cases such as those detailed above, the absence of full procedural protection necessarily prevents the "minimally fair and rational inquiry" into the facts assumed possible by *Sostre.* Indeed, without greater procedural protection than a *Sostre*-type rule affords, there is likely to be no genuine inquiry.

16. Superintendent's Proceeding of Dennis Yarrell, Ossining Correctional Facility, Ossining, New York, January 10, 1972.

Observers of hearings similar to those countenanced by *Sostre* have noted the disciplinary board's inclination to accept a reporting officer's version of the facts without questioning its accuracy. Erik Olin Wright, who attended Adjustment Committee Proceedings at San Quentin, described the normal procedure:

> When [the prisoner] entered the room he was told by the chairman of the committee to sit down and then was read the formal charge of which he was accused. The chairman then asked the prisoner what he had to say for himself. There followed a brief interrogation by each of the committee members, after which the prisoner was told to leave the room and wait outside. The committee then discussed the case for two or three minutes and reached a decision about what punishment should be given the prisoner. *In none of the cases which I witnessed was there any discussion of the possible innocence of the accused prisoner; all that was discussed was the appropriate harshness of the punishment.* Wright, THE POLITICS OF PUNISHMENT 83-84 (1973) (emphasis added).

Ronald Goldfarb and Linda Singer have witnessed the same phenomenon in other states:

> In Wisconsin, for example, there are hearings before a Disciplinary Committee whenever a prisoner is punished for a "substantial" violation. However, based on his observations of the procedure at the State Reformatory, a legal intern concluded: "In essence, the committee takes the facts as stated in the [guard's] conduct report to be true, thus creating a presumption of guilt which is difficult if not impossible for the inmate

to overcome." Our observations of hearings in prisons in other states bear out this conclusion. When there is a substantial question of a prisoner's guilt, the usual practice is to find him guilty but give him a mild sentence. Goldfarb and Singer, AFTER CONVICTION 493 (1973).[17]

The procedural protection afforded by *Sostre* is also inadequate because of the peculiar nature of prison society. Certain unique pressures and relationships exist in prisons which make the need for a close examination of the facts underlying disciplinary action particularly acute. An example of this has been described by a former Director of the Federal Bureau of Prisons:

> [T]he prison society has its way of enforcing its rules. Gambling, for example, is illegal in federal prisons. • • • [W]elching on a bet, however, is a sin to be avenged by some subtle method, such as planting dope or a knife beneath the offender's bed and tipping off an officer. Bennett, I CHOSE PRISON 28 (1970).

Another reality of prison life is that prison guards are likely to be poorly educated,[18] and poorly trained[19] yet

17. Indeed, many inmates have expressed the belief that protestations of innocence may result in a harsher penalty. Thus, in the face of this heavy presumption of guilt, they will admit the violation regardless of whether or not they are guilty. See, Feit, PRISON DISCIPLINE AND THE INMATE SENSE OF INJUSTICE 33 (1971).

18. See the testimony of John B. Greenholtz, Chairman, Nebraska Board of Paroles, and former Deputy Warden, Nebraska Penal and Correctional Complex. Appendix, p. 19.

19. See generally, NEW YORK STATE SPECIAL COMMISSION ON ATTICA ("McKay Commission"), THE OFFICIAL REPORT ON ATTICA 27-28 (1972).

vested with near total control over the lives of inmates.[20] In view of this, there exists a real possibility that they will misuse their authority.[21] Thus, disciplinary procedures such as those established in *Sostre*, which permit an inmate to be punished solely on the basis of a guard's written report, will necessarily constitute an invitation to arbitrariness.

IV.

Throughout our constitutional history, the minimum procedural requirements of the Due Process Clause have proven to be the most effective devices for the discovery of truth and insuring objective decision-making. Although their value has been repeatedly underlined by the Court,

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20. For an analysis of the possible effects of this total control on the guards themselves, see Zimbardo, INTERPERSONAL DYNAMICS IN A SIMULATED PRISON (1972). Professor Zimbardo created a simulated prison at Stanford in which well-adjusted college students role-played prisoners and guards for an extended period of time. At the termination of the study, Zimbardo concluded that:

> Being a guard carried with it social status within the prison, a group identity (when wearing the uniform), and above all, the freedom to exercise an unprecedented degree of control over the lives of other human beings. This control was invariably expressed in terms of sanctions, punishment, demands and with the threat of manifest physical power. There was no need for the guards to rationally justify a request as they did in their ordinary life, and merely to make a demand was sufficient to have it carried out. *Id.* at 41.

21. See, *Landman* v. *Peyton*, 370 F. 2d 135, 140 (4th Cir. 1966):

> Acton's Classic proverb about the corrupting influence of absolute power is true of prison guards no less than other men. In fact, prison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. It is well known that prisons are operated on minimum budgets and that poor salaries and working conditions make it difficult to attract high calibre personnel. Moreover, the "training" of the officers in methods of dealing with obstreperous prisoners is but a euphemism in most states.

it will be helpful to discuss briefly the necessity of each individual procedural requirement in the context of prison disciplinary hearings.

(1) Prior Written Notice of the Charges

The most clearly established principle of due process is that timely and adequate notice must be furnished the party proceeded against. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *In re Gault*, 387 U.S. 1, 33 (1967); *Goldberg* v. *Kelly, supra*, 397 U.S. at 267-268. In prison, notice is particularly important because the rules governing inmate conduct are generally extremely vague and uncertain.[22] Without specific written notice of the charges an inmate will have no opportunity to adequately present his version of the incident or to insure that the hearing is kept within bounds. *Landman* v. *Royster*, 333 F. Supp. 621, 660 (E.D. Va. 1971).[23]

(2) Impartial Tribunal

Whether or not an individual receives a fair hearing ultimately depends on the fairness of the tribunal.

In prison, the nature of institutional society creates serious doubt as to whether any prison employee could be a

22. In New York, for example, there are prohibitions against such things as "vulgar language", "insolence" and "boisterous noise". N.Y. Dept. of Corr. Serv., *Inmates' Rule Book*, Rules 6, 7, 42 (Rev. ed. 1968).

23. The Prisoners' Rights Project recently filed a civil rights action in the United States District Court for the Southern District of New York seeking, *inter alia*, an order compelling the Commissioner of Correctional Services to promulgate and distribute a complete listing of all rules and regulations governing inmate conduct "in sufficiently clear and explicit language so as to prevent inconsistent application, arbitrariness and favoritism." *Betancourt, et al.* v. *Preiser, et al.*, 74 Civ. 1113.

truly impartial member of an disciplinary tribunal. Thus, some lower court decisions have required that at least one member of the tribunal be from outside the prison staff. See *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Collins* v. *Schoonfield*, 344 F. Supp. 257 (D. Md. 1972). At a minimum, however, each member of the tribunal must be free of any prior involvement with the incident under examination so that he may decide the case on the basis of the evidence at the hearing. *Landman* v. *Royster, supra*, 333 F. Supp. at 653.

(3) Confrontation, Cross-examination and Witnesses

The right to confront and cross-examine opposing witnesses has been accepted as being appropriate and necessary "[i]n almost every setting where important decisions turn on questions of fact." *Goldberg* v. *Kelly, supra*, 397 U.S. at 269. The importance of these rights cannot be overestimated. As Chief Justice Warren wrote in *Greene* v. *McElroy*, 360 U.S. 474 (1959):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formulized these protections in the requirement of confrontation and cross-examination. * * * This Court has been zealous to

> protect these rights from erosion. It has spoken out not only in criminal cases * * * [citing] but also in all types of cases where administrative and regulatory actions were under scrutiny. 360 U.S. at 496-97.

In *Davis* v. *Alaska*, —— U.S. ——, 42 U.S.L. Week 4295 (February 27, 1974), the Court again underscored the paramount importance of the right of cross-examination notwithstanding the state's strong and legitimate policy of preserving the confidentiality of juvenile records. 42 U.S.L. Week at 4299.

That prison guards, like other citizens, may at times be motivated by "malice, vindictiveness, intolerance, prejudice or jealousy" is beyond doubt. The necessity for confrontation and cross-examination, therefore, is no less in the context of prison disciplinary hearings. Significant denials of liberty based upon the unchallenged testimony of a faceless accuser are simply not consistent with concepts of fundamental fairness and traditional notions of procedural due process. Millemann, *Prison Disciplinary Hearings And Procedural Due Process—The Requirement Of A Full Administrative Hearing, supra,* 31 Md. L. Rev. at 51; see also Jacob, *Prison Discipline and Inmates' Rights,* 5 Harv. Civ. Rts.—Civ. Lib. L. Rev. 227, 247 (1970).

The traditional rationale for denying cross-examination at prison disciplinary hearings has been that the questioning of correctional officers by inmates would erode the inmate-staff relationship.[24] This rationale, however, is based on an archaic correctional philosophy the most current attribute of which is its frequent repudiation. As the

24. See Brief of Evelle J. Younger, Attorney General of the State of California, *Amicus Curiae,* at p. 10.

President's Commission on Law Enforcement has found, "[d]enying offenders any chance to challenge arbitrary assertions of power by correctional officials * * * [is] inconsistent with the correctional goal of rehabilitation, which emphasizes the need to instill respect for and willingness to cooperate with society and to help the offender assume the role of a normal citizen." TASK FORCE REPORT: CORRECTIONS 82 (1967). Numerous lower courts, in requiring confrontation and cross-examination, have also rejected this rationale.[25] As Judge Merhige has stated:

> The Court appreciates the concern of prison officials that interrogation by prisoner of the guard force may be at variance with their ordinary respective positions in the penal hierarchy. Because most disciplinary cases will turn on issues of fact, however, the right to confront and cross-examine witnesses is essential. *Landman* v. *Royster, supra,* 333 F. Supp. at 653.

Witnesses are also necessary to a fair hearing. "Fact finding is not complete unless illuminated by the testimony of witnesses called by both adversaries." *U.S. ex rel. Neal* v. *Wolfe,* 346 F. Supp. 569, 574-75 (E.D. Pa. 1972). Obviously in any situation where an inmate may have alibi witnesses he will not be able to present a defense unless they are permitted to testify.[26]

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25. *Amicus* relies on the Brief of Respondents for a full listing of these decisions.

26. See *Dodson* v. *Haugh,* 473 F. 2d 689, 690-91 (8th Cir. 1972):

> [I]n this case Iowa's procedure should be reviewed to determine whether they were likely to have established the truth of the asserted violation. * * * For all we know, Dodson may be able to show that he could have called witnesses at his disciplinary hearing who would have established an airtight alibi or mistaken identification by the correctional officer who testified against him. * * * Without an examination of any of the underlying facts, the district court erred in dismissing this action.

(4) Counsel and Counsel Substitute

The right to counsel has long been recognized as an essential element of due process. As was said in *Powell* v. *Alabama*, 287 U.S. 45 (1932), "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 68-69. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the individual. *Goldberg* v. *Kelly, supra,* 397 U.S. at 270-71.

In the prison setting, the absence of counsel may render all other procedural safeguards meaningless. Mr. Justice Powell's observation in *Gagnon* v. *Scarpelli,* 411 U.S. 778, 786-87 (1973), easily adapts itself to the context of prison disciplinary hearings:

> [T]he effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

Amicus is well aware that requiring the states to appoint counsel in all disciplinary hearings might present an unnecessary administrative burden, and thus such a requirement is not urged herein. However, because of the

vital need for counsel in some disciplinary cases, we urge the Court to adopt the test set forth in *Gagnon* and rule that counsel should be provided in those cases where,

> after being informed of his right to request counsel, the [inmate] makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation * * * or (ii) that, even if the violation * * * is uncontested, there are substantial reasons which justified or mitigated the violation * * * and that the reasons are complex or otherwise difficult to develop or present. *Gagnon* v. *Scarpelli, supra,* 411 U.S. at 790.

In all disciplinary cases, however, an inmate should be permitted to bring retained counsel [*Palmigiano* v. *Baxter, supra,* 487 F.2d 1280; *Landman* v. *Royster, supra,* 333 F. Supp. 621] or where none is available, a counsel substitute such as a law student or fellow inmate. See, *Colligan* v. *United States,* 349 F. Supp. 1233, 1238 (E.D. Mich. 1972). The assistance of counsel would enable an inarticulate inmate to present his case in an organized fashion and would insure that all procedural safeguards are observed. The presence of counsel might benefit the prison administration as well. As the court noted in *Palmigiano*:

> Counsel might provide correctional administrators with useful guidance in novel situations where no procedural rules had as yet been developed. And because the precise rudiments of prison disciplinary hearings exist in a developing area of the law where no firm guidelines exist, trained legal counsel may be of important assistance in reaching accommodations between inmates and administrators which would avoid the necessity of continued litigation. 487 F. 2d at 1292.

(5) Written Findings of Fact and Reasons for the Decision

The concept of fundamental fairness has led the Court to declare that administrative bodies must provide written findings of fact and reasons. *Goldberg* v. *Kelly, supra,* 397 U.S. at 271; *Gonzalez* v. *United States,* 348 U.S. 407 (1955); *SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943). Similarly, requiring disclosure of reasons upon which disciplinary rulings are based is crucial to the maintenance of fairness, as it will preclude insulation of such decisions from scrutiny. Indeed, where there is no statement of findings of fact and reasons for the disciplinary decision, the harm caused by the vagueness of prison regulations[27] is greatly compounded. Cf. *Monks* v. *New Jersey State Board of Parole,* 58 N.J. 238, 277 A. 2d 193 (1971).

In sum, the need for the procedural safeguards outlined above is as great in prison as in other areas. And what Mr. Justice Frankfurter once wrote in a related context merits restatement here:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depends on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy

27. See footnote 23, *ante.*

of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. *Joint-Anti Fascist Refugee Committee* v. *McGrath, supra,* 341 U.S. at 171-172 (concurring opinion).

Conclusion

For the above reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., *et al.*,

Petitioners,

v.

ROBERT O. McDONNELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR AMICUS CURIAE THE NATIONAL PRISON PROJECT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., *et al.*,

Petitioners,

v.

ROBERT O. McDONNELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR AMICUS CURIAE THE NATIONAL PRISON PROJECT

INTEREST OF AMICUS CURIAE

The National Prison Project of the American Civil Liberties Foundation, Inc., is a non-profit, tax-exempt New York corporation, engaged in efforts, through staff attorneys and other employees, to develop rehabilitative and other programs and facilities, devise model prison procedures and regulations, and otherwise to improve prison conditions in the United States.

In furtherance of the activities described above, the Project's staff attorneys and other employees are engaged in the counseling and representation of prisoners incarcerated in penal institutions throughout the country. The Project has been involved in many important cases with issues similar to those in the case at bar. Eg. *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 198 (2d Cir. 1971); *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md., 1972); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va., 1971); *Nieves v. Oswald*, 477 F.2d 1109 (2d Cir. 1973); *Adams v. Carlson*, 368 F. Supp. 1050 (E.D. Ill., 1973).

SUMMARY OF ARGUMENT

The only issue before this Court with which this brief is concerned is what process, if any, is due prisoners faced with accusations of serious misconduct and subject to potentially severe punishment. *Amicus Curiae* National Prison Project contends that such prisoners are entitled to the "minimum requirements of due process," *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), and that the opinion of the lower court ought to be affirmed.

Severe prison punishment can directly and indirectly compromise the most fundamental prisoner interest there is – the interest in personal liberty and freedom from incarceration. Substantial prison punishment can also abridge other prisoner interests that are of critical importance including the ability of prisoners to enjoy the basic entitlements of prison life and participate in programs of rehabilitation. These important interests are entitled to recognition as being "within the contemplation of the 'liberty' or 'property' language of the Fourteenth Amendment," *Morrissey v. Brewer, supra*, at 481. Prisoners enjoying these

interests are entitled to the protection from arbitrary revocation and abridgment of these interests provided by the "minimum requirements of due process."

No legitimate state interest dictates that any of these "minimum requirements" be abrogated. Indeed, it is in the interest of the state to assure that prisoners facing severe punishment are provided with these procedural requirements in order that the potential for prisoners' rehabilitation be maximized. The flexible nature of procedural due process allows legitimate state interests to be protected without sacrificing these procedural protections which are essential to accurate fact-finding. These protections include the right to written notice of charges and disclosure of the basis of accusations of misconduct, the opportunity to be heard in person and to present witnesses, the right to confront and cross-examine adverse witnesses, the right to representation by retained counsel or counsel-substitute and, in certain limited instances, to appointed counsel, and the right to a written decision by an impartial hearing tribunal.

ARGUMENT

THE DUE PROCESS CLAUSE REQUIRES THE PROVISION OF A PROCEDURALLY FAIR ADMINISTRATIVE HEARING TO PRISONERS CHARGED WITH MISCONDUCT AND FACING POTENTIALLY SEVERE PUNISHMENT.

This Court has held that a hearing is necessary before the government may act in a way injurious to private interests if "the nature of the interest [jeopardized by governmental action] is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). If the interest is found to be constitutionally protected, the analysis of the scope and content of the process due before that interest may be compromised "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

The threshold inquiry, therefore, is twofold: what interest of prisoners is compromised by governmental decision-making and is this interest entitled to constitutional protection.

A. Prison punishment can constitute severe and grievous loss.

Although the existence of liberty is viewed by many as determined by the inflexible dichotomy that one is free when not imprisoned and one is not free when imprisoned, it is clear that gradations of institutional freedom exist both within a single institution and among several institutions.

Institutional freedom in most prison systems reaches its nadir within the confines of maximum security prisons and is at its zenith at minimum security centers, which usually are marked by a reduction in security devices and practices.[1]

Within the same prison there are separate quarters where prisoners are accorded different degrees of liberty. These levels of custody generally range from solitary confinement, the most restrictive form of imprisonment, through confinement in stratified levels of punitive segregation to confinement

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[1] Maximum security institutions . . . may be viewed as those facilities characterized by high perimeter security, high internal security, and operating regulations that curtail movement and maximize control . . . .

Today medium security institutions probably embody most of the ideals and characteristics of the eary attempts to reform offenders. It is in these facilities that the most intensive correctional or rehabilitation efforts are conducted. Here inmates are exposed to a variety of programs intended to help them become useful members of society. But the predominant consideration still is security . . . .

[Minimum security institutions] are relatively open, and consequently custody is a function of classification rather than of prison hardware . . . . [They] range from large drug rehabilitation centers to small farm, road and forestry camps located throughout rural America.

National Advisory Commission on Criminal Justice Standards and Goals, *Report on Corrections*, 343-345 (1973). (Hereinafter, *Advisory Commission Report*-1973). *See also, Task Force on Corrections, The President's Commission on Law Enforcement and Administration of Justice* (1967) (Hereinafter, *President's Commission Report*-1967); Tappan, *Crime, Justice and Correction*, 701-703 (1960); Sykes, *The Society of Captives* (1958).

in the "general population," the most common type of custody.[2]

The existence or absence of various privileges or rights hinges upon the security status of the institution in which a prisoner is confined and his level of custody within that institution. Vocational, work release and other rehabilitative programs tend to be reserved for prisoners in minimum security institutions.[3] The opportunity for parole increases as a prisoner progresses through the chain of maximum-medium-minimum prison security.[4] While prison officials' concern with regard to a maximum security prisoner relate

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[2] The term solitary confinement is used to describe a punitive custody status that has been variously described as isolation, segregation, punitive segregation or solitary confinement. *See*, The American Correctional Association, *Manual of Correctional Standards*, 411-416 (3rd ed. 1966).

For a description of the harsh conditions of confinement in the solitary cells of some prisons, *see*, *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Knuckles v. Prasse*, 302 F. Supp. 1036, 1061-62 (E.D. Pa., 1969), *aff'd.*, 435 F.2d 1255 (3rd Cir. 1971), *cert. den.*, 403 U.S. 936, *reh. den.*, 404 U.S. 877 (1971); *Aikens, et al. v. Lash, et al.*, Civil Action No. 72 S 129 (N.D. Ind., January 23, 1974); *Hancock v. Avery*, 301 F. Supp. 786 (M.D. Tenn., 1969); *Jordon v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal., 1966).

A multi-level stratification scheme for punitive isolation is described in *Meyers v. Alldredge*, 348 F. Supp. 807 (M.D. Pa., 1972).

[3] *See* n. 1, *supra*.

[4] The information available to the parole board at the time of a hearing typically is prepared by the institution staff, usually a caseworker. The caseworker, in turn, relies almost totally on reports on the offender's adjustment to prison life and progress in moving from maximum to minimum custody status. *Advisory Commission Report* (1973) at 400. *See also*, 28 C.F.R. §2.24; Glaser, *The Effectiveness of a Prison and Parole System* (1964); *National Parole Institutes, Selection for Parole*, (New York: National Council on Crime and Delinquency, 1966).

primarily to maintaing security, their concerns with regard to a minimum security prisoner emphasize preparation for his return to the outside world.[5]

In addition to controlling the extent of a prisoner's liberty by determining the institution in which he is imprisoned and his level of custody within that institution, prison officials also control the length of a prisoner's sentence by granting, denying, or revoking accrued credit for time served (Hereinafter "good time").[6]

Severe prison punishment can, therefore, directly and indirectly compromise the most fundamental and basic prisoner interest there is – the prisoner's interest in personal liberty and freedom from incarceration. Denial or revocation of "good time" directly extends the length of a prisoner's period of incarceration, often for months or even years.[7] In addition, the revocation of "good time"

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[5] *See* n. 1, *supra.*

[6] "Good time" is credited against a prisoner's total sentence; its purpose is to reward good behavior and hence, provide an incentive to rehabilitation. Generally mandated by statute, it is common to allow the reduction of a sentence by five to ten days for each month served without a record of misbehavior. Hence, a prisoner's sentence may be reduced by as much as one-fourth or one-third, if he maintains a good record while in prison.

All states except Hawaii, Kansas, Louisiana and Utah, have statutes providing for good time credit for good behavior. The federal good time statute is found at 18 U.S.C. §4161 (1964). *See* Jacob, "Prison Discipline and Inmate Rights," 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 227, 231, n.'s 17, 18 (1971).

[7] In *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir., 1973) *reh. den.* 1973, a prisoner lost twenty-one months of good time postponing his release almost two years. *See also, Kritsky v. McGinnis*, 313 F. Supp. 1247 (N.D.N.Y. 1970) (eighteen months of good behavior time credits forfeited).

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immediately and automatically *forfeits* the right of some prisoners to be considered for parole[8] and, for others, seriously jeopardizes the possibility for positive parole consideration.[9]

Prison punishment can abridge other prisoner interests that are also of critical importance. The confinement of prisoners in solitary or punitive segregation cells, a

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[7] (continued) The cancellation of such credits thus inflicts the same kind of "grievous loss" on the prisoner as does the revocation of parole. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Cf. *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (Imprisonment for even one day is a constitutionally significant denial of liberty); *Sands v. Wainwright*, 357 F. Supp. 1062, 1082 (M.D. Fla., 1973), remanded for rehearing on procedural grounds, 14 Cr. L. Reptr. 2538 (5th Cir. Dec. 26, 1973).

[8] 28 C.F.R. §2.12(A) states in part:

> Any forfeiture of statutory good time shall be deemed to indicate that the prisoner has violated the rules of the institution to a serious degree, and a *parole will not be granted* in any case in which a forfeiture remains effective against the prisoner concerned. [Emphasis supplied].

[9] In the vast majority of jurisdictions, prisoners receive good time as a matter of right if they conform to prison regulations. *United States ex rel. Miller v. Twomey*, *supra*, n. 7, at 714, n. 28; Jacob, *supra*, n. 6, at 231. Good conduct (and the consequential accumulation of "good time") is generally found to be the most important item considered by parole board members. *Presidents Commission, Report-1967*, *supra*, n. 1, at 393-394. Thus, the fact that a prisoner's parole report reflects misconduct serious enough to warrant forfeiture of good time, substantially affects the parole board's "judgment as to his potential for living a law-abiding life in the community." *United States ex rel. Miller v. Twomey*, *supra*, n. 7, at 714, n. 27.

punishment which can last for months or even years,[10] inevitably results in the inability of confined prisoners to qualify for or participate in the programs of rehabilitation available in the prison[11] and to enjoy the most basic entitlements of prison life.[12] Punishment

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[10] Bryant v. Harris, 465 F.2d 365 (7th Cir. 1972); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert. den., sub. nom., Oswald v. Sostre, 404 U.S. 1049 (1972); Adams v. Carlson, 368 F. Supp. 1050 (E.D. Ill., 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va., 1971); Knuckles v. Prasse, *supra*, n. 2.

[11] Walker v. Hughes, No. 39765 (E.D. Mich., January 24, 1974) (Appendix A); California, *Report of the Assembly Select Committee on Prison Reform and Rehabilitation, Administrative Segregation in California Prisons* (Hereinafter *California Report*), Recommendations 4-6 (September 1973).

[12] La Reau v. MacDougall, 473 F.2d 974 (2d Cir. 1972); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Wright v. McMann, *supra*, n. 2; Adams v. Carlson, *supra*, n. 10; Knuckles v. Prasse, *supra*, n. 2; Hancock v. Avery, *supra*, n. 2; Jordon v. Fitzharris, *supra*, n. 2. See also, *California Report*, *supra*, n. 11, Recommendations 7-13.

In 1951, Barnes and Teeters said in *New Horizons in Criminology* (2d ed. 1961) at 425, "[r]esorting to [solitary confinement] for long periods of time is an excellent illustration of the total lack of imagination and an outmoded type of prison administration all too current in most of our prisons." This comment recognized a reality that has existed for years. In 1867, Charles Dickens visited an American penitentiary and commented:

> In the outskirts, stands a great prison called the Eastern Penitentiary, conducted on a plan peculiar to the State of Pennsylvania. The system here is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong. In its intentions, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this

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of this nature can also be the premise for parole denial.[13]

The interests of prisoners at issue when severe prison punishment is possible are, therefore, of great magnitude, requiring protection. The forfeiture of "good time," whether it is viewed as traditional or qualified freedom, is indistinguishable[14] from revoked parole, *Morrissey v. Brewer, supra,* and the denial of the opportunity to participate in programs of rehabilitation is a withdrawal of the most important benefit of prison life.[15]

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12 (continued)

> system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what they are doing. . . . I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs are not so palpable to the eye . . . and it extorts few cries that human ears can hear; therefore, I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.
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> C. Dickens, *Pictures from Italy and American Notes* at 283 (1867).

13 *See* n. 9, *supra.*

14 Prisoners released from prison before their scheduled release date because they have been credited with "good time" are in most jurisdictions, *see, e.g.,* 18 U.S.C. §4164, treated exactly as if they were on parole. In jurisdictions where the earning of "good time" results in expedited release without continuing supervision "good time" liberty would be absolute.

15 Penologists in the United States today are generally agreed that the prison serves most effectively for the protection of society against crime when its major emphasis is on rehabilitation. They accept this as a fact that no longer needs to be debated. The

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B. The traditional and rudimentary elements of procedural due process defined in *Morrissey v. Brewer* and *Gagnon v. Scarpelli* are applicable to prison disciplinary proceedings threatening severe punishment.

The Petitioners and *Amicus Curiae* in support of Petitioners ignore not only the very substantial interest of prisoners, but also the flexible nature of due process in arguing that the general elements of due process spelled out by this Court in *Morrissey v. Brewer, supra,* and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) are inapplicable to prison disciplinary proceedings threatening severe punishment.

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15 (continued)
best thought in what was once called the penal field and is now significantly called the correctional field is directed toward developing institutional plants, personnel and programs that will accomplish the rehabilitation of as many offenders as possible and will enable those who cannot be released to adjust as well as possible to the restricted life of the prison. Although prison administrators know that a substantial percentage of adult offenders are not likely to be salvaged by any methods we have thus far developed, they direct their programs of rehabilitation to the presumably incorrigible as well as the probably reclaimable group, and consider only a small minority of prisoners as completely hopeless cases. This may seem to be an impractical and visionary viewpoint, but it is wholly realistic and is based on a clear-cut idea of what rehabilitation is and what it can accomplish. American Correctional Association, *A Manual of Correctional Standards,* 10 (3rd ed. 1966). *See President's Commission Report* (1967) at 6; *McGinnis v. Royster,* 410 U.S. 263, 93 S.Ct. 1055, 1063 (1973); *Walker v. Hughes, supra,* n. 11 (Appendix A).

None of the elements[16] of *Morrissey* or *Gagnon* are inconsistent with legitimate state interests. Indeed, the state has an affirmative interest in guaranteeing that inmates are treated fairly, an interest that can only be realized by adhering to basic due process precepts.

1. The elements of procedural due process are not inconsistent with legitimate state interests.

The Petitioners and *Amicus Curiae* in support of Petitioners, advance several justifications for eliminating one or more of the *Morrissey-Gagnon* rudiments of due process from a prison disciplinary proceeding threatening severe punishment. These justifications include the needs for broad discretion,[17] prompt decision-making,[18] maintenance of security,[19] and avoidance of administrative burdens.[20] It is also argued that the unique nature of a prison

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16 The "elements" of procedural due process which *Amicus Curiae* National Prison Project contends should be made available to prisoners facing potentially severe punishment include the "minimum requirements of due process" described by the court in *Morrissey v. Brewer, supra,* n. 7, at 489, and the right to the representation of counsel under the conditions stated in *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). *See infra,* at 27. It is *not* contended that Morrissey's "two-stage" hearing procedure is necessary.

17 *See generally,* Briefs of Petitioners and *Amicus Curiae,* State of California.

18 *See,* Brief of *Amicus Curiae,* State of California at 10.

19 *See generally,* Brief of Petitioners at 33, 34; Brief of *Amicus Curiae,* State of California at 10, 11.

20 *See generally,* Brief of Petitioners at 28, 29, 72; Brief of *Amicus Curiae,* State of California at 8, 9.

environment[21] supports the abrogation of traditionally accepted procedural rights. None of these asserted justifications, nor any other,[22] counsel against a *Morrissey-Gagnon* hearing requirement in those instances where prisoners face potentially severe punishment.

The necessity for investing prison officials with discretion in maintaining a corrections system is obvious. The complexities of supervising a large group of persons confined within a very limited area and the experience of correctional officials in performing this task support this investment of discretion. But, even if a prison system is

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21 *See*, Brief of *Amicus Curiae*, State of California at 6-8.

22 The Second Circuit in *Sostre v. McGinnis, supra*, n. 10 reversed a lower court opinion requiring basic elements of due process prior to the imposition of serious punishment, *see Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y., 1970), on the grounds, *inter alia*, that prison disciplinary hearings, unlike administrative decisions to terminate welfare and evict tenants from public housing, are not adversary proceedings and do not deal with difficult questions of fact. *Sostre v. McGinnis, supra*, n. 10, at 196-197.

These asserted bases for summary decision-making are, it is respectfully contended, unpersuasive. *Morrissey v. Brewer, supra*, n. 7, rejects the position that labelling a proceeding "non-adversarial" solves due process problems where liberty or other important interests are at stake. The issue before prison disciplinary tribunals is: did the prisoner do what he is alleged to have done, and if so, is it a violation of prison rules? In thus applying general prison policies – "law" – to a given set of facts to determine guilt, the disciplinary panel is performing a quasi-adjudicatory function. It is anomalous to regard this quasi-adjudicatory proceeding as "non-adversarial" while concluding that proceedings which may terminate welfare payments or evict tenants from public housing are adversarial and therefore demand, in the latter cases, the complete observance of normal due process principles. *See, Goldberg v. Kelly*, 397 U.S. 254 (1970); *Escalera v. New York City Housing Authority*, 425 F. 2d 853 (2d Cir., 1970); *Caulder v. Durham Housing Authority*, 433

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carefully controlled by qualified administrators, unlimited discretion is inappropriate because no other administrative system exercises such centralized and complete power over the lives and destinies of men.[23] This grant of power should carry with it the requirement of strict review regardless of the asserted wisdom and experience of administrators. "Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties . . . [a] mistrust that does not depend on an assumption of inveterate venality or incompetence on the part of men in power . . . ." *Covington v. Harris*, 419 F.2d 617, 621 (D.C. Cir., 1969).

Furthermore, trained and experienced prison administrators often exist only at the tip of the correctional "iceberg." The lower echelon correctional officers responsible

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[22] (continued) F.2d 998 (4th Cir., 1970), *cert. den., Housing Authority of City of Durham, N.C. v. Caulder*, 401 U.S. 1003 (1971).

[23] Justice Stewart, speaking for the majority of this Court in *Preiser v. Rodriquez*, 411 U.S. 475 (1973) noted the extensive supervision exercised by prison officials over all details of a prisoner's life. "The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a state and a private citizen . . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the state." *Id.* at 492.

Another judge graphically described the total power prison officials have over the lives of inmates, stating: "[T]he most striking aspect of prison, in terms of Fourteenth Amendment litigation, is that prison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings, (except perhaps in the realm of the spirit, and inevitably there as

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for policy implementation and day-to-day decision-making are almost always underpaid, understaffed, or inadequately trained. *See, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* 6 (1967). (Hereinafter *President's Commission-Report* [1967]). Recent decisions are replete with example of the substantial extent to which custodial officers, sometimes in conjunction with prisoners, assume and exercise the responsibility for all significant decision-making within a prison. *See, e.g., Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark., 1970), *aff'd.,* 442 F.2d 304 (8th Cir., 1971); *Gates v. Collier,* 349 F. Supp. 881 (N.D. Miss., 1972); *Landman v. Royster,* 333 F. Supp. 621 (E.D. Va., 1971); *Collins v. Schoonfield,* 344 F. Supp. 257 (D. Md., 1972). The decisions also reveal the abuses of discretion and denial of basic prisoner rights which inevitably follow from insulated and unreviewed decision-making.

A finding of prisoner misconduct is, in this case, the premise for the exercise of discretion. It is this factual finding, which is not an exercise of discretion, that requires observance of procedural protections. As in the case of parole revocation, "a simple factual hearing will

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[23] (continued) well) from sundown to sundown, sleeping, walking, speaking, silent, working, playing, viewing, eating, voiding, alone, with others. It is not so, with members of the general adult population. State governments have not undertaken to require members of the general adult population to rise at a certain hour, retire at a certain hour, eat at certain hours, live for periods with no companionship whatever, wear certain clothing, or submit to oral and anal searches after visiting hours, nor have state governments undertaken to prohibit members of the general adult population from speaking to one another, wearing beards, embracing their spouses, or corresponding with their lovers." *Morales v. Schmidt,* 340 F. Supp. 544, 550 (W.D. Wis., 1972), rev'd, 2 Prison L. Rep. 154 (7th Cir., 1973).

not interfere with the exercise of discretion." *Morrissey v. Brewer, supra,* at 483.

Prompt decision-making, concededly a legitimate state interest in certain circumstances,[24] is not jeopardized by a procedurally fair hearing since it is not contended that a *Morrissey*-type hearing must precede separation of a troublesome prisoner from the general prison population or that such a hearing is constitutionally mandated in all or even most instances of alleged prisoner misconduct.[25] Lower courts, in fashioning flexible hearing systems in this context, have only required the observance of the *Morrissey-Gagnon* rudiments of due process, or a facsimile thereof, where severe punishment[26] is threatened and the substantial prisoner interest dictates these protections. *See,*

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[24] Prison officials may clearly have to move quickly in cases of group disturbances or riot or where an individual prisoner is creating an immediate danger of the safety of himself or others. Separation of prisoners from the general population and confinement of prisoners in isolated cells may have to precede a hearing in these instances. No justification is apparent, however, for failure to provide prisoners with a hearing *prior* to revocation or forfeiture of "good time."

[25] Lower courts have required the "minimum requirements of due process", *Morrissey v. Brewer, supra,* n. 7 at 489, only where severe punishment is possible. *See, e.g., Landman v. Royster, supra,* n. 10, (requiring a *Morrissey*-type hearing when "good time" may be revoked, solitary or maximum confinement imposed or padlock confinement imposed for more than 10 days); *Sands v. Wainwright, supra,* n. 7 (requiring Morrissey-type hearing where "good time" may be revoked or disciplinary segregation imposed); *Collins v. Hancock,* 354 F. Supp. 1253 (D.N.H., 1973) (requiring *Morrissey*-type hearing where more than 30 days "good time" may be revoked or more than 5 days solitary or 15 days punitive segregation imposed); *Bundy v. Cannon,* 328 F. Supp. 165 (D. Md., 1971) (requiring *Morrissey*-type hearing where more than 5 days "good time" may be revoked or 15 days segregation imposed).

[26] *Id.*

Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973); *Landman v. Royster, supra; Bundy v. Cannon*, 328 F. Supp. 165 (D. Md., 1971). However, even in these instances, the courts have properly held that the hearing may follow administrative action where the circumstances require prompt attention.[27]

Nor would the presence of counsel or counsel-substitute in these limited number of cases, unduly delay administrative decision-making since the provision of a right to counsel could be conditional upon counsel's prompt presence[28]

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[27] If immediate pre-hearing action by correctional officials is necessary, *see*, n. 24, this action should, at a minimum be predicated on findings that there is a strong probability that the accused prisoner is guilty of substantial misconduct and that his conduct poses a clear and present threat to his safety or the safety of others. In addition, there should be an appropriate investigation and prompt review by supervisory personnel of the action taken by lower echelon correctional officials. *See, e.g., Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md., 1972) (Appendix B).

Although summary decision-making is appropriate in these instances, a hearing should be afforded the prisoner as soon after this decision-making as is reasonably possible. *See, e.g., Bundy v. Cannon, supra*, n. 25 (within 72 hours except where there are "exceptional circumstances"); *Collins v. Schoonfield, supra*, (Appendix B) (48 hours); *Landman v. Royster, supra*, n. 10, at 653 (within "a reasonable interval").

[28] The court in *Landman v. Royster, supra*, n. 10 after holding that prisoners facing severe punishment were entitled to the right to retain counsel at disciplinary hearings, stated:

> On the other hand, the Court has observed that prison officials legitimately desire to conduct disciplinary proceedings speedily. Therefore a prisoner who desires to secure counsel for hearing may be required to notify the committee of that fact, and postponement of the hearing to secure counsel may reasonably be limited to four days, 333 F. Supp. at 654.

and counsel-substitute would be already present in the institution. Moreover, the undisputed right of the administrative tribunal to reasonably order and control the hearing process provides assurance that no undue delays need occur. Indeed, counsel may well be of substantial assistance in expediting disciplinary hearings by properly and professionally presenting the relevant evidence and assisting the tribunal in ordering the hearing.[29]

The contentions that correctional officials will ignore misconduct[30] if fair hearings are required in some disciplinary proceedings and that extending to prisoners the right

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[29] Counsel can also be of service to the administrative tribunal by assisting the tribunal in the very difficult determination of what punishment is due once the prisoner is found guilty of misconduct. The analogy to probation-revocation, *see Gagnon v. Scarpelli, supra*, n. 10, 93 S.Ct. at 1764, and parole-revocation proceedings is apt:

> "Conviction does not obviate the need for counsel, but merely changes the focus of the decision-making process. The [parole] board may not be required to reincarcerate, and the individual should have an opportunity to affect the disposition. The range of dispositional alternatives is broad enough that counsel could be of significant aid to both the board and the parolee in selecting the optimum alternative. Further, considerations at disposition are similar to those at sentencing or probation revocation where the need for counsel has been recognized." "The Parole System," 120 U. Pa. L. Rev. 282, 357 (1972).

[30] *See, generally*, Brief of Petitioners at 35.

of cross-examination at such proceedings will, in some general sense, erode prison security[31] are similarly without merit. The former argument is simply not supported by the experience of prison systems extending such rights[32] and is strikingly similar to a contention made by the state in *Morrissey v. Brewer* and rejected by this Court. *Morrissey v. Brewer, supra,* at 383, n. 10. Furthermore, it may be that the imposition of *Morrissey-Gagnon* standards upon major prison disciplinary proceedings would discourage

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[31] *See,* Brief of *Amicus Curiae,* State of California,at 10, 11.

[32] *See, e.g.,* study cited by Petitioners in their brief at 37 indicating an increase in accusations of prisoner misconduct after entry of a consent decree providing for procedural rights at prison disciplinary hearings. While this study seems to show that procedural due process rights do not broadly discourage officials from punishing misconduct, *Amicus Curiae* National Prison Project does not accept the assertion of Petitioners that the requirement of due process rudiments was responsible for this increase. Indeed, correctional administrators do not share Petitioner's view in this regard:

> Administrators generally believe that increased judicial intervention is responsible for certain types of alterations in prisoner-staff relations. However, administrators attribute the overall decline in respect for institution personnel less to the courts than to those changes in society which have led to similar decline in respect for law enforcement and other established authority generally. Administrators do *not* believe that the increase in physical assaults on staff by prisoners was, in general, caused by the increased judicial involvement in correctional matters. "Judicial Intervention in Corrections: The California Experience" – An Empirical Study, 20 U.C.L.A. L. Rev. 452, 492 (1973). [Emphasis supplied].

78% of the administrators polled in this study indicated their belief that court imposed standards for the treatment of prisoners had no affect on prisoner disciplinary problems. *Id.* at 512.

arbitrary accusations of prisoner misconduct, but that, certainly, is one purpose of, not a defect in, a fair hearing system.

The second contention, that intangible injury to prison security will result from a fair hearing requirement and particularly from the provision of confrontation and cross-examination rights, presumes a staff-prisoner relationship that is archaic. *The President's Commission on Law Enforcement and the Administration of Justice* rejected the concept that prison security is dependent upon unlimited and unquestionable power, stating in its report that "the 'collaborative regime' advocated in this volume is one which seeks to maximize the participation of the offender in decisions which concern him, one which seeks to encourage self-respect and independence in preparing offenders for life in the community. It is inconsistent with these goals to treat offenders as if they have no rights, and are subject to absolute authority of correctional officials." *President's Commission Report*-1967 at 83. In addition, the presence of counsel or counsel-substitute at major disciplinary hearings could provide a "buffer" between prisoner and accusing officer that could reduce prisoner-correctional official conflict.

The positive experience of the many correctional systems that guarantee full hearing rights to prisoners accused of major misconduct[33] provides the best evidence that security is not undermined by such procedures.

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33 "75% of the most commonly identified elements of disciplinary due process are available to prisoners in a majority of jurisdictions . . . ." *Survey of Prison Disciplinary Practices and Procedures*, American Bar Association Commission on Correctional Facilities and Services, at 2 (1974) (Hereinafter cited as *A.B.A. Survey*.)

While the creation of a *Morrissey-Gagnon* hearing system within state prisons would undoubtedly require some initial expenditures of public funds and concentration of administrative resources, it is indisputable that these concerns are not a viable basis for denying procedural due process rights, *see, Goldberg v. Kelly*, 397 U.S. 254, 266 (1970); *Morrissey v. Brewer, supra,*[34] and it is apparent that the burden will not be unduly heavy. The limited number of hearings that would be required,[35] the limited number of cases in which counsel would be required, see *infra*, at p. 34, the present availability of prisoner-assistance programs[36] and the present existence of a number of prison

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34 "[C]onstitutional requirements are not, in this day, to be measured or limited by dollar consideration . . . ." *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

35 *See* n. 25, *supra.*

36 An American Bar Association Survey indicates that there are 63 law schools which have prisoner assistance programs and that a substantial number of state public defender programs have prisoner-assistance components. In addition, a number of states have set up specialized legal service programs for prisoners. *See, Providing Legal Services to Prisoners: An Analysis and Report*, A.B.A. Commission on Corrections Facilities and Services at 15-25 (1973). The Federal Bureau of Prisons has existing legal services programs in many of its institutions. *See*, Affidavit of Eugene Barkin, General Counsel of Federal Bureau of Prisons filed in *Starnes v. McGuire*, No. 73-1034 (pending in D.C. Cir.) (Appendix C).

systems already in compliance with such requirements[37] or easily placed in compliance,[38] support the proposition that the burden is a manageable one.

The contention that the unique features of prison life are relevant to deciding whether a *Morrissey-Gagnon* model for major disciplinary proceedings is appropriate[39] is uncontrovertible. These considerations, however, do not weaken, but bolster the basis for requiring such a hearing.

James V. Bennett, former Director of the Federal Bureau of Prisons, explained that while prison officials control the institutions, subtle manipulations of prison discipline can and do occur: "The prison society has its way of enforcing its rules. Gambling, for example, is illegal

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37 *See generally, A.B.A. Survey*, at 9-11, it would appear that over 20 jurisdictions provide a *Morrissey* hearing, or a reasonable facsimile thereof, to prisoners facing potentially severe punishment. *Id.* at 11. At least 14 jurisdictions apparently allow representation by counsel and at least 39 allow representation by counsel-substitute. *Id.*

38 *Id.* Only 17 of the jurisdictions which responded to the *A.B.A. Survey* indicated that they do not allow prisoners to call witnesses or confront accusers at prison disciplinary hearings. 21 indicated that they don't allow cross-examination. All jurisdictions, it appears, have some already-established hearing process.

39 *See*, Brief of *Amicus Curiae*, State of California at 6-8.

in federal prisons . . . welching on a bet, however, is a sin to be avenged by some subtle method, such as planting dope or a knife beneath the offender's bed and tipping off an officer." J.V. Bennett, *I Chose Prison* 28 (1970). Unwarranted prisoner punishment premised upon untrustworthy evidence or misinformation received from other prisoners is not the sole reason, however, why full procedural protections are necessary. Judicial recognition of the especially real possibility of misuse of authority by prison guards is contained in *Landman v. Peyton,* 370 F.2d 135, 140 (4th Cir. 1966):

> Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men. In fact, prison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. It is well known that prisons are operated on minimum budgets and that poor salaries and working conditions make it difficult to attract high calibre personnel. Moreover, the 'training' of the officers in methods of dealing with obstreperous prisoners is but a euphemism in most states.

It is in order to guard against reliance upon the testimony of individuals who "might be prejurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy that we require confrontation and cross-examination." *Greene v. McElroy,* 360 U.S. 474, 496-97 (1959).

2. The state has an affirmative interest in providing prisoners faced with potentially severe punishment with a procedurally fair hearing.

It is patently obvious that the state has no interest in punishing prisoners who are *not* guilty of institutional misconduct. *Morrissey-Gagnon* safeguards are the minimally necessary assurance that factual findings of prisoner misconduct are not arbitrarily made. *See, infra,* at 27. Moreover, as this Court noted in *Morrissey*, "fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness . . . ." *Morrissey v. Brewer, supra,* at 484. The prisoner, like the parolee, "is not the only one who has a stake in his conditional liberty." *Id.* Society's "interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions," *id.*, is rooted in the necessity for treating law-breakers lawfully so that future lawful conduct is encouraged.

Penologists[40] have recognized that summary punishment within a prison creates the same reactions to arbitrariness

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[40] David Fogel, Director of the Illinois Law Enforcement Commission and former Commissioner of the Minnesota Department of Corrections, explained the vital necessity of treating prisoners with fairness and justice:

> The justice model seeks to engage both the keeper and the kept in a joint venture, which would force the agencies of justice to operate in a lawful and just manner. It simply means a belief that the prisoner did not use lawful means outside the prison and should therefore be provided more (not fewer) opportunities to learn lawful behavior in the institution. The efforts of the staff should be geared to teaching a prisoner how to use lawful processes to achieve his ends, as well as to

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– hostility, bitterness and anger . . . as arbitrary parole revocation, a reaction that can only serve to undermine a prisoner's respect for authority and therefore, his rehabilitation.[41]

The state, in arguing for abbreviated procedures, ignores its role as "the potent, . . . ominipresent teacher," *Olmstead v. United States,* 277 U.S. 438, 485 (1927) (Dissenting opinion of Justice Brandeis) and disregards the fact that "the validity and moral authority of a conclusion largely depend on the mode by which it is reached." *Joint Anti-Facist Refugee Comm. v. McGrath,* 341 U.S. 123, 171-172 (1951) (Concurring opinion of Justice Frankfurter). Rather than being an impediment to the maintenance of

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[40] (continued) accept responsibility for the consequences of his behavior. In the absence of a continuum of justice in the prison, most ends are reached unlawfully. When unlawful behavior in the prison is detected, the standards of due process that we insist upon outside the prison are not applied. The result is a further indication to the convict that lawful behavior for a convict has little payoff. He can be dealt with arbitrarily and usually responds by treating others in the same manner. The justice model would make sure that the prisoner experienced lawful ways of dealing with problems with the expectation that there would be a carryover to the point of release. The prison experience would try to guarantee that at least for the period of incarceration the prisoner would be exposed to the type of lifestyle that society expects him to pursue when he is released.

Fogel, *The Justice Model for Social Work in Corrections,* Social Work Practice and Social Justice, 26, 32 (N.A.S.W. 1972).

[41] Commentators have also recognized this principle. "It is submitted that one of the most disruptive influences upon the rehabilitative scheme is the belief that the law is arbitrary." Comment, 33 U. Pitt. L. Rev. 638, 642-43 (1972).

discipline, a fair hearing procedure contributes to prison security by reducing prisoner hostility, forcing prisoners to confront their own misconduct and encouraging respect for lawful authority.

An indirect consequence of a fair hearing system, in the interest of the state and our judicial system, might well be a decrease in prisoner litigation. Besides providing a principled basis for reasonable judicial deference to prison decision-making,[42] the creation of fair hearing systems will

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[42] The judicial forum must always be available to remedy arbitrary decision-making, but judicial deference to administrative decision-making is certainly more warranted where the decision-making process is fair. The apparent suggestion by petitioners that this Court hold that state prisoners are outside the protection of the Fourteenth Amendment, *see* Brief of Petitioners at 21, is an argument that courts abdicate their constitutional responsibilties. Indeed, the responsibility of the judiciary may, for several reasons, be heavier when prison policies, such as those in this case, are challenged. The judiciary and correctional officials jointly determine the length of a prisoner's sentence. In imposing sentence, a judge does not anticipate that prison officials will unreasonably revoke a prisoner's "good time" or arbitrarily impose punishment that otherwise increases the period of time a prisoner must be incarcerated. Procedurally fair hearings are the assurance that the sentencing judge's assumptions are warranted.

In addition, in almost every state prison rules and regulations are the product of secret decision-making involving neither the public nor prisoners since most prison systems are not within the purview of state administrative procedure acts. *See, e.g.*, W.Va. Code, §29A-1-2, Art. 1 (1971 Replacement Volume). *See, Palmigiano v. Baxter*, 487 F.2d 1280, 1283-84 (1st Cir. 1973). Judicial deference to these policies is questionable not only because they were promulgated without the beneficial "constraints of public discussion and scrutiny," *id.*, but also because other branches of the government may not be aware of or concerned with problems within prisons. In most states prisoners and ex-felons are barred completely from the political process and cannot vote, run for public office or hold positions of trust. *See generally*, "The Collateral Consequences of a Criminal Conviction," 23 Vand. L. Rev. 929 (1970).

resolve many prisoner-official disputes *within* the prison system and provide a basis, with written findings and summarized testimony, for more easily evaluating the merits of other disputes. Although evaluative data is rare, existing reports seem to indicate that the expectation of reduced prisoner litigation is well founded.[43]

3. A balancing of interests dictates the requirement in this case of a procedurally fair hearing incorporating the elements of *Morrissey* and *Gagnon*.

The nature of a prison disciplinary hearing is quasi-adjudicatory[44] and the interest at stake in such a proceeding, unconditional and conditional liberty is of the greatest

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[43] The experience in the Kansas State Penal System is instructive. Two years ago that system adopted a prison disciplinary code incorporating full procedural protections. *See, A.B.A. Survey*, 11. The experience since then is summarized in the March 10, 1974, Kansas City Star:

> John C. Hazelet, acting penal director, praised Kansas's disciplinary code for inmates, noting that it is a model code now being copied by other states. Among its best features is the granting of right to counsel for inmates charged with serious rule infractions.
>
> Hazelet said that since it was adopted two years ago, inmate lawsuits against penal authorities have dropped 98 percent.
>
> The committee plans to publish its findings as result of the hearings in a few months. *Id.* at p. 5A, cols. 1-4.

[44] *See* n. 22, *supra*.

magnitude. Neither the maintenance of discipline and security nor the proper exercise of professional expertise and administrative discretion by prison officials are compromised by the requirement of a *Morrissey-Gagnon* hearing in major disciplinary cases. Such a process would positively contribute to the rehabilitative goal of incarceration. No state interest justifies the abridgment of any of the basic elements of *Morrissey* or *Gagnon*. Thus, prior to the imposition of severe prison punishment, prisoners should be entitled, at a minimum to the following rights.[45]

a. The right to specific notice of charges, the disclosure of evidence and a written decision.

Prison rules are, in many instances, extremely vague and uncertain.[46] The right to both specific notice of the charges and a written decision containing the evidence relied upon and the reasons for the decision takes on added significance when prohibited conduct is vaguely and generally described. Specific notice not only informs the accused of his alleged misconduct but may also generally serve the accused with initial notice of the precise conduct considered improper by correctional authorities.

The harm caused by the vagueness of prison regulations in describing prohibited conduct is compounded when there is no written decision. The lack of a written decision undermines the prisoner's right to appeal his decision to higher administrative authorities, a right now granted

[45] *See* n. 16, *supra*.

[46] *See, e.g., Landman v. Royster, supra*, n. 10 at 655-56; *Dabney v. Cunningham*, 317 F. Supp. 57 (E.D. Va., 1970); *Smoake v. Fritz*, 320 F. Supp. 609 (S.D.N.Y., 1970). *See generally*, Jacob, *supra*, n. 6 at 235-37.

by virtually every prison system, *see A.B.A.*, Survey at 11, since the reviewing body is unable to appreciate with particularity the acts which the accused is found to have committed and the evidence supporting a determination of guilt. The result can only be unthinking deference to the decision of the lower administrative body. Finally, it is clear that the opportunity to defend against charges of misconduct is valueless unless the basis for the allegations of misconduct are disclosed to the accused. *Cf. Morrissey v. Brewer, supra.*

Lower court opinions, *Bundy v. Cannon, supra; Landman v. Royster, supra; Sands v. Wainwright, supra, Workman v. Mitchell,* Civil Action No. 8-71C3 (W.D. Wash., July 20, 1973); *Clutchette v. Procunier,* 328 F. Supp. 767 (N.D. Cal., 1971); *Walker v. Hughes, supra,* (Appendix A)[47] and the rules of virtually all prison systems, *A.B.A., Survey at 11,* require written notice prior to hearing and punishment and a written decision which includes findings, a summary of the evidence and reasons for the decision.

b. The right to confrontation, cross-examination and witnesses.

The right to confront and cross-examine opposing witnesses has been accepted as being appropriate and necessary "[i]n almost every setting where important decisions turn on questions of fact." *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970). The requirement that major prison disciplinary proceedings guarantee prisoners the right to confrontation and cross-examination, unless "good cause" for not allowing confrontation is shown, *Morrissey v. Brewer,*

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[47] *Accord, United States ex rel. Miller v. Twomey, supra,* n. 7, (7th Cir. 1973); *Gray v. Creamer,* 465 F.2d 179 (3rd Cir. 1972).

supra, is vital to avoid arbitrary decision-making.[48] For the same reasons, prisoners should be entitled to call witnesses in their behalf at major disciplinary proceedings. It is an empty promise to guarantee fairness while omitting the tools necessary to accomplish that fairness.[49] Lower

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[48] Wigmore, *A Treatise on the Anglo-American System of Evidence*, §1367 at 28-29 (3rd ed. 1940) states:

> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. *See, Sands v. Wainwright, supra*, n. 7, at 1087.

[49] The contention of *Amicus Curiae*, United States that the Federal Bureau of Prisons' Policy Statements on Inmate Discipline (7400.5B) and Withholding, Forfeiture and Resotration of Good Time (7400.6A) are constitutional, disregards the fact that these procedures omit the most critical procedural elements for avoiding arbitrary decision-making. Policy Statement 7400.5B does not allow prisoners the rights to confrontation, cross-examination or presentation of witnesses or the right of representation, despite the fact that prisoners going before the adjustment committee face potentially severe punishment. *See, e.g., Adams v. Carlson, supra*, n. 10.

Policy Statement 7400.6A empowers the Good Time Forfeiture Board to substantially affect the length of a prisoner's sentence without providing him with the right to cross-examination or confrontation or the right to be represented by counsel. *See, Workman v. Mitchell*, 8-71C3 (W.D. Wash., July 20, 1973).

"Fact-finding" inevitably becomes automatic deference to the contentions of unknown accusers under these circumstances. *See, Walker v. Hughes, supra*, n 11 (Appendix A); *Workman v. Mitchell, supra*

court opinions, *id.*,[50] the rules of many prison systems, A.B.A. Survey at 11, and model codes[51] recognize the necessity for providing prisoners with these basic rights.

c. The right to an impartial tribunal

It is essential that an impartial tribunal preside at any constitutionally required hearing, *Morrissey v. Brewer, supra; Goldberg v. Kelly, supra; In re Murchison*, 349 U.S. 133, 136 (1955). To be impartial a tribunal should be as nearly as possible free from interests which conflict with its obligation to fairly and objectively find facts and apply law. *Id.* The importance of an impartial tribunal to prisoners facing potentially severe punishment may be even greater than to parolees facing revocation in light of

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[50] *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973); *Workman v. Mitchell, supra*, n. 49; *Colligan v. United States*, 349 F. Supp. 1233 (E.D. Mich., 1972); *Bowers v. Smith*, 353 F. Supp. 1339 (D. Vt., 1973); *Walker v. Hughes, supra*, n. 11; *Bundy v. Cannon, supra*, n. 25; *Landman v. Royster, supra*, n. 10; *Sands v. Wainwright, supra*, n. 7; *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Calif., 1971); *Collins v. Hancock*, 354 F. Supp. 1253 (D.N.H., 1972).

[51] *Standard* 2-12, *Advisory Commission Report*-1973, at 51; Rule V-7, *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, Center for Criminal Justice, Boston University School of Law, 1973, at 165-66.

the closed and secluded nature of a prison setting.[52] Lower courts have suggested various administrative mechanisms for insuring impartiality.[53]

d. The right to counsel

Johnson v. Avery, 393 U.S. 483 (1969) established the constitutional right of prisoners to render legal assistance to fellow prisoners. That decision was based upon the fact that many prisoners are uneducated and inarticulate and simply unable to adequately represent themselves. This Court recently recognized that where accusations of rule violations are made and conditional liberty is at stake an "unskilled or uneducated" person is at a distinct disadvantage and "may well have difficulty in presenting his

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52 Control over official discretion within prison walls is vital for other reasons as well. Most decision-making of correctional personnel is less visible to the public than is the decision-making of other public officials, and therefore less likely to benefit from the inherent contraints of public discussion and scrutiny.

Prisoners themselves have no opportunity to participate in a political process which might otherwise provide some guidance for official discretion. Moreover, because prisoners are under the constant care and supervision of correctional personnel within "total institutions" which regulate every aspect of their lives, there exist awesome possibilities for misuse of discretion to the extent that decisions which affect prisoners in important ways may be made arbitrarily or based upon mistakes of fact. *Palmigiano v. Baxter, supra*, n. 50, 487 F.2d at 1283-84.

53 These alternatives include, *inter alia*, requiring that the hearing officer be a lawyer, *see Collins v. Schoonfield, supra*, n. 27 (Appendix B), requiring that at least one member of the administrative

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version of the disputed set of facts . . . ." *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 1762 (1973).[54] An unskilled or uneducated prisoner, when faced with accusations of misconduct and potentially severe punishment, is doubly disadvantaged. He must not only struggle with his lack of education, but also must overcome the fact that he is probably segregated from potential witnesses prior to the hearing, that his testimony will be presumed to lack credibility,[55] and that his hearing will be held in a private

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[53] (continued) tribunal be from outside the particular institution conducting the hearing, *see Bundy v. Cannon*, *supra*, n. 25, and requiring at a minimum, that the official initiating or involved in processing the charges of misconduct be disqualified from sitting as part of the administrative tribunal. *See, Landman v. Royster*, *supra*, n. 10.

[54] The right of counsel is a bare necessity for due process of law when the inmate's length of incarceration is involved. It is virtually impossible for an inmate to marshal a legal defense by himself. Even if he has easy access to legal materials he is not able to conduct an investigation separate from that of the disciplinary committee; obviously all of these problems are magnified if the prisoner is in punitive segregation. Comment, 17 Wayne State U. L. Rev. 931, 947 (1971).

[55] *See*, Brief of *Amicus Curiae*, State of California at 7.

and potentially hostile atmosphere. It is this combination of factors that supports the requirement of counsel pursuant to the guidelines set forth in *Gagnon v. Scarpelli, supra.*

Prison officials have little reason to oppose such a prisoner right. The necessity for providing counsel will only arise in a small minority of cases, those which potentially threaten severe punishment and which satisfy *Gagnon* requirements. Indeed, the appointment of counsel may not be necessary in some or even most of the cases where the right is constitutionally recognized since waiver of this right will certainly occur and prisoner legal assistance programs exist which may well satisfy this need.[56]

No other state interest justifies the denial of the right to counsel. Its provision need not cause delay, see *supra,* at 17. It is hardly plausible that disciplinary hearings will be more burdened by the presence of counsel than the presence of counsel-substitute, which most prison systems now allow, *see A.B.A. Survey at 11,* and there is no basis for assuming that the presence of counsel at prison disciplinary hearings will be any more difficult for administrators to cope with than the presence of lawyers at other administrative hearings. *See Gagnon v. Scarpelli, supra; Goldberg v. Kelly, supra; Caulder v. Durham Housing Authority,* 433 F.2d 998 (4th Cir. 1970), *cert. den., Housing Authority of City of Durham, N.C. v. Caulder,* 401 U.S. 1003 (1971).[57]

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[56] *See* n. 36, *supra.*

[57] *Amicus Curiae* National Prison Project share Respondents' view that the right to appointed and retained counsel stands on a basis independent of due process. *See,* Brief of Respondents at 32.

In cases where severe punishment is possible, but it is not constitutionally required that counsel be appointed, prisoners should be afforded the right to retain counsel, *see, Palmigiano v. Baxter,* 487 F.2d 1280 (1st Cir. 1973); *Landman v. Royster, supra; Sands v. Wainwright, supra; Workman v. Mitchell, supra; Collins v. Schoonfield, supra.*[58] or, at a minimum, the right to representation by counsel substitute. *See Bundy v. Cannon, supra; Colligan v. United States,* 349 F. Supp. 1233 (E.D. Mich., 1972); *Morris v. Travisono,* 310 F. Supp. 857 (D.R.I., 1970).

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[58] *Accord: Bowers v. Smith, supra,* n. 50; *Inmate 24394 v. Schoen,* 363 F. Supp. 683 (D. Minn., 1973); *Walker v. Hughes, supra,* n. 11. (Appendix A) Model codes provide for this right. *See,* § 4, *A Model Act for the Protection of Rights of Prisoners,* (National Council on Crime and Delinquency at 17, (1972) (Providing for counsel where punishment "may affect the sentence or parole eligibility – such as the loss of good time allowance"); Rule V-8, *Model Rules and Regulations on Prisoners Rights and Responsibilities,* at 167, Center for Criminal Justice, Boston University School of Law (1973); *Standard* 2.12, *Advisory Commission Report*-1973.

CONCLUSION

For the reasons stated above, *Amicus* prays that the decision below be affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RANDOLPH WALKER, *Plaintiff,* vs. CHARLES HUGHES, former Warden, and HERB BEAL, individually and in his capacity as Warden of the Federal Correctional Institution at Milan, Michigan, *Defendant.*	:	No. 39765
DANIEL S. BRIDGE, on behalf of himself and all others similarly situated, *Plaintiffs,* vs. CHARLES HUGHES, former Warden, and HERB BEAL, individually and in his capacity as Warden of the Federal Correctional Institution at Milan, Michigan, *Defendant.*	:	No. 39834
MELVIN DRAIN, *Plaintiff,* vs. CHARLES HUGHES, former Warden, and HERB BEAL, individually and in his capacity as Warden of the Federal Correctional Institution at Milan, Michigan, *Defendant.*	:	No. 40066

MEMORANDUM OPINION

In this class action plaintiffs allege that the procedures of the adjustment committee at the Federal Correctional Institution at Milan, Michigan (Milan) deprive the plaintiffs of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution.[1] Plaintiffs contend that three distinct deprivations occur: (1) Inmates' liberty is further restricted by placement into segregation. (2) Inmates' are transferred from Milan to maximum security penitentiaries for long-term adults. (3) Inmates' parole dates are adversely affected.

Milan is a medium security institution for young offenders. It has a wide-range of rehabilitative programs for its inmates, including vocational training, education, psychiatric and psychological therapy, and recreation. Defendant Herbert Beall is the Warden at Milan, and is responsible for the administration of the institution.[2]

The parties have stipulated that plaintiffs Randolph Walker and David Bridge are representatives of the class of plaintiffs consisting of all inmates at Milan who are subject to the adjustment committee. Plaintiff Melvin Drain brought suit in this court on the same or similar issues, and these cases were consolidated for trial and decision.

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[1] This court was faced with a similar issue in Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich., 1972).

[2] The suit was originally filed against Charles Hughes, the former Warden at Milan. The parties stipulated to the substitution of party-defendant.

I. FINDINGS OF FACT

Plaintiff Walker

1. Prior to February 7, 1973, plaintiff Walker was housed in the therapeutic community at Milan. Therein, Walker enjoyed the benefits of freedom of movement within the unit, personal and group therapy, recreation, education and vocational training.

2. After an incident on February 7, 1973, Walker was placed in segregation and given a written incident report, written by guard Richard Cox, accusing him of assaulting another inmate during the incident.

3. Sometime on or before February 9, 1973, Walker's caseworker and counselor, Richard Rison, as well as Lt. Ashworth and Capt. Yinger, questioned Walker concerning the incident.

4. Thereafter, at least four adjustment committee hearings were held concerning the Walker incident.[3] At the first, on February 9, 1973, the committee consisted of Rison, Dr. Weaver (Chief Psychologist) and Mr. Edgington (Business Manager). Walker was instructed to tell his side of the story, which he did. No decision was reached at this hearing.

5. On February 12, 1973, a second hearing was held. The committee at this hearing consisted of Capt. Yinger, Officer Friedman and Associate Warden Guienze. Walker repeated his story and no decision was reached.

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[3] Findings of fact numbers 4, 5, 6, 7 and 9, are based on a stipulation of the parties. Walker testified to somewhat different facts as to the committee membership at each of his hearings.

6. On February 14, 1973, the committee met for the third time. The members of the committee were the same as those at the second hearing. Again no decision was reached.

7. Another hearing was held on February 16, 1973. This time the committee consisted of Capt. Yinger, Warden Guienze and Caseworker Rison. At this hearing, Walker changed his story. At the fifth hearing he was informed of the committee's decision to recommend his transfer to the penitentiary at Terre Haute, Indiana. Later it was determined that Walker would be transferred to the federal penitentiary at Lewisberg, Pennsylvania, a maximum security institution.[4]

8. According to the committee's written finding of guilt in the Walker case, the finding was based on "information provided by investigation into the incident."

9. At some point the assault charge was referred to the Federal Bureau of Investigation for possible prosecution, but this was subsequently declined.

10. Walker was never told at any of the hearings: (a) that he could have counsel or counsel substitute; (b) that what he said might be used against him; (c) that he could confront his accuser; (d) that he could call witnesses in his defense; (e) that he could see the investigative reports.

Plaintiff Bridge

11. The parties stipulated to the following findings of fact with respect to Bridge:

[4] The court entered a preliminary injunction prohibiting this transfer. Walker resided in a segregation unit at Milan from February, 1973, until December of 1973, when he was released to the general population.

"On or about January 17, 1973, Petitioner, DANIEL S. BRIDGE, was charged by the respondent on his authorized representative with five acts: (a) engaging in, or encouraging, a group demonstration; (b) refusing to obey an order from any staff member; (c) conduct which disrupts or interferes with the security or orderly running of the institution; (d) participating in an unauthorized meeting or gathering; and (e) assaulting a staff member.

On the evening of January 18, 1973, Petitioner was informed of the charges against him.

On January 22, 1973, before the 'adjustment committee,' petitioner made a request to have counsel appointed to represent him.

He (Petitioner) denied touching the officer in the above incident.

Petitioner was found guilty of all offenses charged on January 17, 1973.

Petitioner requested to confront the officer making the charges. The request was denied.

As a result of these charges, Petitioner was confined to Administrative Segregation.

He was not offered assistance of counsel or counsel substitute. He was not allowed the opportunity to call witnesses on his own behalf. Nor was he allowed to confront and cross-examine adverse witnesses.

A member of the adjustment committee was Captain Yinger. Mr. Bridge's complaining officer on January 17, 1973, is Senior Correctional Officer, Bunkie Elliott.

Petitioner originally filed his Motion for Writ of Habeas Corpus on or about March 21, 1973. Subsequently he was transferred to the Federal Correctional Institution at Terre Haute, Indiana, on April 13, 1973. He was confined to administrative segregation at Terre Haute from his arrival through May 21, 1973."

Plaintiff Drain

12. Prior to April 10, 1973, Drain was placed in the honor block at the institution. The benefits of this placement included an unlocked room and unlimited visitation by his family which resides in Detroit.

13. On April 10, 1973, Drain was charged with possession or introduction of any narcotic paraphernalia, and given written notice of the charge in an incident report.

14. The adjustment committee in Drain's case received the following report in an investigation into the incident:

"Drain has been named several times as the 'kingpin' in our drug activities in the Institution. He was suspected of pressuring inmates working in the business office to introduce contraband drugs. On one situation after receiving information that he had pressured an inmate for this purpose, a large amount of marijuana was found on a study release inmate that we suspect was intentionally dropped prior to search. Due to lack of conclusive evidence, we were unable to charge Drain with this incident. I might add that earlier

> this date there was a fight involving two unknown black inmates in F-1 Dormitory, the combatants ran from the dorm and could not be identified. Drain has a larceration on his leg and scratches on his hand that could have resulted from a fight."

Also, the investigator stated:

> "It is the conclusion by this writer that DRAIN is the most active and powerful of the suspected drug dealers within the institution."

15. At the hearing Drain was asked to explain his side of the story and he denied any connection with the incident. Drain wanted to call a witness on his own behalf but was not allowed to do this.

16. The committee found Drain guilty. In its written findings, the committee stated that this was based on the "incident report" and on "your statement," referring to Drain's denial.

17. Finding number 10, *supra*, applies to Drain.

18. Pursuant to the recommendation of the adjustment committee, Drain was transferred to the Federal Penitentiary at Terre Haute, Indiana, a maximum security institution for long-term adults, and was held in segregation for considerable time upon his arrival.

Witness Saxner

19. Prior to August 17, 1973, witness Saxner was incarcerated at Milan. On that date, he asked a prison employee, Lopez, about improperly handling a fellow prisoner.

A discussion ensued; other inmates gathered. Lt. Edwards of the staff arrived, and asked Saxner to tell him what happened.

20. That afternoon, Saxner was called to Capt. Yinger's office. Also in the office were Lt. Ashworth, Caseworker Rison and other officers. Saxner was given a written incident report charging him with threatening an officer, insolence toward a staff member and conduct which disrupts or interferes with the security or orderly running of the institution. Lopez was the accuser.

21. In Capt. Yinger's office, Saxner was asked if he had anything to say, and he denied the allegations. Lt. Ashworth told him he was unsuited for Milan and that he was being transferred to the Federal Penitentiary at Terre Haute, Indiana immediately. This transfer was termed an "administrative" transfer, rather than one resulting from an adjustment committee finding of guilt. That day Saxner was transferred to Terre Haute.

22. Finding number 10, *supra*, applies to Saxner.

23. At Terre Haute, Saxner has been kept in segregation. Part of the basis for this has been the August 17, 1973, incident report at Milan.

24. Saxner was never found guilty and never appeared before an adjustment committee denominated as such.

Witness Horton

25. Prior to August 21, 1973, Dale Horton was an inmate at Milan. On that date he was given an incident report charging him with conduct disruptive to the institution and encouraging a group demonstration. This charge

was based on the discovery of three posters in Horton's locker. Identical posters were found throughout the prison that day. The posters stated "United, Do It Now, Fast."

26. The next day Horton appeared at the adjustment committee and was asked to give his version of the facts. He admitted possession of the posters, but stated he had found them.

27. Finding number 10, *supra*, applies to Horton.

28. The committee found Horton guilty on August 22. Part of the basis on which that finding was made was a rumor that Horton was a "troublemaker." (This was testified to by Capt. Yinger). Also cited in the incident report, as evidence of the incident, was the fact that a list of "addresses of several people and news medias from outside the institution" was found in the locker.

29. The committee decided that Horton should be transferred to the Federal Correctional Institution at Petersburg, Virginia.

30. The court finds that inmates at Milan are subject to three deprivations if found guilty by the adjustment committee: (a) Inmates may be placed in segregation where their rehabilitative programs are severely restricted. (b) Inmates may be transferred from Milan, a medium security, long-term adult facility. (c) Inmates' parole dates are adversely affected.

31. Further, the court finds that it is the practice of the administration at Milan in cases before the adjustment committee that a written incident report is given to the accused inmate, signed by the accusing staff member; that an investigation is undertaken and a statement is taken from the accused inmate; that the report of the investigation

is given to the committee; that the committee asks the accused inmate his version of the facts; and that when a finding of guilty is made, it is based on the investigation report.[5]

32. Finally, the court finds that the administration at Milan in adjustment committee cases does not afford an accused inmate an opportunity to confront and cross-examine adverse witnesses, to call witnesses in his own defense, to remain silent, or to see investigation reports. Also, no attempt is made to provide a continuously identical panel of fact finders, or to exclude either staff who have investigated the incident, or the inmate's caseworker.

II. DISCUSSION

As noted, the prisoners contend that the extent of the deprivations visited upon an accused inmate who is found guilty by the adjustment committee requires the application of certain aspects of due process in an adjustment committee hearing. The government contends that the only due process procedures required are those already used by the adjustment committee.

In analyzing this issue, the court is guided by the analysis in *Morrissey v. Brewer*, 408 U.S. 471 (1972). Therein,

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[5] These procedures are in substantial compliance with the Milan Institution Policy Statement; Subject: Inmate Discipline, MM 7400.1, 7-20-72. *See also*, Bureau of Prisons Policy Statement; Subject: Inmate Discipline, No. 7400.5B, 6-6-72, which is quoted at length in *Colligan, supra*, n. 1, 349 F. Supp. at 1238-39, n. 1.

the Supreme Court held that the due process clause of the Fourteenth Amendment required that certain procedural rights be afforded a parolee before his parole can be revoked. In reaching this conclusion, the court first examined the nature of the parolee's interest in remaining on parole, in order to dertermine whether the interest was within the scope of the protection of the Fourteenth Amendment. Then the court, having determined that due process applied, balanced the interests of the government with those of the parolee, to determine what process was due.

A. The inmate's interest in remaining in the general population

The evidence in the case is strong that an inmate has a substantial interest in remaining in the general population or in one of the honor units at Milan. Once put in segregation, an inmate loses benefits[6] that are important to him; they form the very core of his rehabilitative program. These include psychological therapy, recreation and exercise, and education and vocational training. Perhaps more important is the substantial loss of freedom of movement. An inmate in segregation is allowed out of his cell only for visiting, showers, medical treatment and one hour of exercise per day.

An inmate who is transferred to a maximum security institution for long-term adults sustains losses in addition to those discussed above. *See, Capitan v. Cupp*, 356 F. Supp. 302, 303 (D. Ore., 1972); *Gomes v. Travisono*, 353

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[6] It does not matter whether these benefits are labeled "rights" or "privileges." *Morrissey v. Brewer*, 408 U.S. at 482. *See also, Landmar v. Royster*, 333 F. Supp. 621, 651 (E.D. Va., 1971).

F. Supp. 457 (D. R.I., 1973); *White v. Gillman*, 360 F. Supp. 64 (S.D. Ia., 1973). A most significant disadvantage is the change from confinement with inmates of similar age to confinement with inmates of older age.[7] Further, it is the practice of the prison authority at Terre Haute, to which two witnesses were transferred from Milan, to place transferees into segregation for a considerable time.

Finally, there is no dispute that the parole date of an inmate found guilty of a disciplinary infraction is adversely affected.[8]

These deprivations to an inmate found guilty virtually end the inmate's rehabilitative program. The deprivations amount to a "grievous loss," within the meaning of *Morissey, supra.*[9] The court concludes that the interests of an

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[7] In 1972, the average age of prisoners at Milan was 23.5 years, while at Lewisberg, the average age was 31.8. Federal Bureau of Prisons Statistical Report, 1972, at p. 34.

[8] Disciplinary infractions and placement in segregation deprive an inmate of "the opportunity to appear under more favorable circumstances before the parole board for consideration for release on parole." *Carothers v. Follette*, 314 F. Supp. 1014, 1027 (S.D. N.Y. 1970). This also applies to youth offenders whose release dates are determined by the Youth Corrections Division of the Board of Parole under 18 U.S.C. 5017(a). *See also, Clutchette v. Procunier*, 328 F. Supp. 767, 777 (N.D. Cal., 1971).

[9] "Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer a grievous loss." *Morrissey v. Brewer*, 480 U.S. at 481.

inmate in remaining in the general population, or in an honor unit, are substantial and that the due process clause of the Fifth Amendment is applicable and an inmate must be afforded a minimal due process hearing before he can be deprived of these benefits.[10]

B. Balancing the interests

Chief Justice Burger stated in *Morrissey v. Brewer, supra,* at 481:

> "It has been said so often by this court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."

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[10] There was a time when courts would not entertain prisoners' challenges to prison procedure. *See, e.g., Powell v. Hunter,* 172 F.2d 330 (19th Cir. 1949). But the recent decisions are unanimous that while courts will not interfere with the broad discretion exercised by prison officials, courts will entertain prisoner petitions asserting violations of constitutional rights and will grant relief where appropriate. *See, e.g., Johnson v. Avery,* 393 U.S. 483 (1969); *Matthews v. Hardy,* 420 F.2d 607 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 1010 (1970); *Beard v. Alabama Bd. of Corrections,* 413 F.2d 455 (5th Cir. 1969); *Jackson v. Bishop,* 404 F.2d 571 (8th Cir. 1968); *Nolan v. Scafati,* 430 F.2d 548 (1st Cir. 1970); *Gray v. Creamer,* 465 F.2d 179 (3d Cir. 1972); *Breeden v. Jackson,* 452 F.2d 578 (4th Cir. 1972). Thus it is stated that prisoners do not lose all of their constitutional rights when they enter a prison. *See, e.g., Jones v. Wittenberg,* 323 F. Supp. 93 (N.D. Ohio, 1971), *aff'd sub nom., Jones v. Metzger,* 456 F.2d 854 (6th Cir. 1972). "A prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law." *Coffin v. Reichard,* 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945).

The determination of what process is due must be the result of a balancing of the governmental function served by the adjustment committee and the inmates' interests to be affected thereby.

1. The function of the adjustment committee

The chief objectives of the processes of the adjustment committee are the security of the prison and the discipline (rehabilitation) of the inmates. The government argues, and the court agrees, that the prison administration needs a process for enforcing its rules, for the protection of the inmates, the administration and indeed society itself. Moreover, each inmate, as part of his rehabilitation program, needs to learn to live "by the rules" as a prerequisite to a successful life in society.

The prison administration is interested in a process that best advances the goals of internal security and inmate discipline. Such a process is one that operates swiftly and efficiently, for an inmate who knows that such a process will be visited upon him will be less likely to break the rules.

But the goals of internal security and inmate rehabilitation are also advanced by a process that provides optimum opportunity for an accurate determination of the truth of the accusation. An innocent inmate whose rehabilitation program is ended following an erroneous finding of guilt is an inmate quite likely to be beyond rehabilitation thereafter. The court emphasizes the rehabilitation objective of the Milan facility. *Cf.*, 18 U.S.C. §§4081 and 5011.

Also, in light of the rehabilitation objective, the prison administration should be interested in a process that gives

the inmate the sense that his case is fairly and justly decided. Such a process can assist in the inmate's rehabilitation by teaching respect for law.

2. The interests of the inmate

Turning now to the process in which the inmate is interested, it is apparent that he is likewise interested in accuracy, because of the nature and extent of the deprivations he may suffer.

He is also interested in efficiency. In addition to the concern caused by the pendency of the unresolved accusation, an inmate can reasonably be expected to suffer the anxiety of segregation that is commonly visited upon an inmate pending final determination of the charge. Also, as a result of segregation, an inmate's rehabilitation is interrupted and his release time may be affected.

C. The present process

It is apparent to the court that the prison administration, in determining what procedures to incorporate into its adjustment committee process, places heavy emphasis on efficiency and case of administration. The procedure now in use consists of little more than written notice to the inmate and an opportunity for the inmate to make a statement. The court cannot sanction such a process. The process puts too little emphasis on accuracy, a goal in which both the inmate and the administration have a strong interest. More important, the process is one that makes no effort to instill in the inmate a sense of fairness and justice. It does not aid in his reconciliation to society.

This does not mean that the full panoply of criminal due process rights must be accorded to an inmate. Such a process would give too little weight to efficiency and would unduly burden prison resources.

D. The due process requirements

In determining what process is constitutionally due in a prison setting the court is guided by the need for a compromise between efficiency and accuracy in the procedures of the adjustment committee. The issue has faced other courts with respect to other kinds of institutions.[11] The cases are unanimous that a prisoner is entitled to notice of the charges, to confront the evidence, and to make a statement. *See, e.g., Sostre v. McGinnis,* 442 F.2d 178 (2d Cir. 1971); *Braxton v. Carlson,* 483 F.2d 933 (3d Cir. 1973); *Clutchette v. Procunier,* 328 F. Supp. 767 (N.D. Cal., 1971); *Sands v. Wainwright,* 357 F. Supp. 1062 (M. D. Fla., 1973).

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[11] The defendant relies heavily on *Sostre v. McGinnis,* 442 F.2d 178 (2d Cir. 1971). The petitioner therein, an inmate at Green Haven Correctional Facility in New York, challenged his placement into segregation. The court held that a procedure involving notice of the accusation, confrontation with the evidence and an opportunity to make a statement was sufficient to satisfy due process requirements.

Sostre is distinguishable on several grounds. That case dealt with a long-term adult offender incarcerated in a maximum security institution, the primary objection of which is not rehabilitation. Also, *Sostre* was decided before *Morrissey v. Brewer, supra.*

A neutral, detached and continuously identical panel of fact-finders is essential to an accurate determination of fact in each case. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Thus from the adjustment committee must be excluded any employee who investigated the incident, the accused inmate's caseworker (because of the confidentiality of the relationship), and anyone in a superior-subordinate relationship with the accuser (to eliminate the possibility of "command influence"). This principle was violated in several respects in this case. Walker's caseworker, Rison, served on Walker's adjustment committee. Moreover, both Rison and Capt. Yinger (who also sat on the committee) questioned Walker about the incident before the first hearing. The court notes that Walker's committee was not continuously identical at each of its several meetings. The requirement of continuity will not only aid in fact-finding accuracy, but it will also make the process more efficient, and will help instill the sense of fairness that the inmate needs for his rehabilitation.

An inmate must be permitted to remain silent. Every inmate who testified stated that he was "instructed" or "requested" to tell his side of the story. Taking advantage of the right to remain silent must not constitute an automatic waiver of defense, however; an accused inmate must be afforded the opportunity to confront the evidence. Again, no inmate was given this opportunity. To give substance to both the right to remain silent, and the right to confront evidence, the inmate must be allowed, subject to reasonable regulation, to confront and cross-examine adverse witnesses, to see tangible evidence, and to present defense witnesses. History and tradition teaches that these procedures are essential to an accurate determination of the

truth of an accusation.[12] *See Morrissey v. Brewer, Goldberg v. Kelly, supra; Greene v. McElroy,* 360 U.S. 474 (1959); *Clutchette v. Procunier, supra; Sands v. Wainwright, supra.* At the same time, these procedures need not unduly burden prison resources, nor unduly lengthen the committee process. The court will approve reasonable regulations allowing the adjustment committee wide discretion with respect to the scope and length of cross-examination, and the number of defense witnesses. Even if there is a minimal loss in efficiency through the use of these procedures this is counter-balanced by an increase in the reliability of the fact-finding process, and by an increase in the accused inmate's sense that he was fairly treated. Thus due process does not permit these procedures to be excluded arbitrarily from every adjustment committee case.

The court also holds that an accused inmate must be afforded, again subject to reasonable regulation, counsel or counsel-substitute, such as another inmate, a prison employee, or a law student. Again this will aid in the fact-finding process without burdening prison resources or lengthening the process.

Finally, the court holds that the decision of the adjustment committee must be based upon, and only upon, the evidence. Several violations of this principle occurred in the case. Several inmates were found guilty on the basis of the accusation itself. Also, part of the basis for the finding of guilt in Drain's case was rumor and opinion

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12 "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly,* 397 U.S. at 269.

concerning Drain's drug activities.[13] A written decision summarizing the evidence and the reasons for the decision will force a close scrutiny of the evidence, without burdening the process.

These procedures must be employed in every case before the adjustment committee. In addition, the process must be applied every time that an inmate is subject to substantial deprivations for alleged violations of prison rules. The administration cannot avoid constitutional due process requirements by labeling a transfer "administrative" rather than "disciplinary," as happened in Horton's case.

Further, the court recognizes the need for segregation of an accused inmate, pending final determination. However, in such a situation, the process must be commenced as soon as it is reasonably feasible.

Finally, each accused inmate must be informed either orally or in writing of his procedural rights when he appears before the committee.

III. CONCLUSIONS OF LAW

1. The nature and extent of the deprivations visited upon an inmate found guilty by the adjustment committee are such that the due process clause of the Fifth Amendment applies to adjustment committee processes.

2. The process now employed by the prison administration at Milan does not comport with due process in that it gives too much weight to efficiency and case of administration and insufficient weight to the accuracy of the

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[13] *See also*, finding of fact number 28, *supra*.

process and the desirability of instilling a sense of fair play into the inmate, in light of the rehabilitation objective of Milan.

3. Due process in the circumstances of this case requires that an accused inmate be afforded:[14] (a) a neutral, detached and continuously idential panel of fact-finders, from which must be excluded investigators, the accused inmate's caseworker, and any one in superior-subordinate relationship with the accuser; (b) the opportunity to remain silent; (c) the opportunity to confront his accuser; (d) the opportunity to cross-examine adverse witnesses; (e) the opportunity to present defense witnesses; (f) counsel or counsel substitute; (g) a written decision based upon and only upon the evidence; (h) oral or written notice of his procedural rights; (i) a hearing as soon as reasonably feasible after an inmate is placed in segregation following an alleged incident.

IV.

The court has received letters and petitions from several inmates at Milan (plaintiffs in this class action), concerning the procedures of the adjustment committee. The court requests that counsel in the case meet with a prison official to discuss the proper disposition of these matters, in light of this opinion.

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[14] As noted above, due process also requires written notice to the accused inmate. *See Colligan*, n. 1, *supra*. However, the court will not incorporate such a requirement into an order, because the prison administration currently gives written notice as part of its procedure. *See* finding of fact number 31, and n. 4, *supra*.

The court will order the return to Milan of the named plaintiffs who have been transferred to Terre Haute. Further, the court will order the reinstatement of each named plaintiff to the status and quarters he occupied prior to the alleged incident that resulted in his segregation or transfer, unless the prison administration affords the inmate a new hearing that fully complies with this opinion. Also, the court will order each named plaintiff's prison record expunged of any record of any hearing that does not comply with the mandates of this opinion.

An appropriate order including within its terms a certification as to the class, may be submitted.

/s/ JOHN FEIKENS

John Feikens
United States District Judge

Dated: Detroit, Michigan
January 24, 1974

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APPENDIX B

Excerpted from *Collins v. Schoonfield*,
344 F. Supp. 257 (C.D. Md., 1972) (interim decree).

IV. HEARINGS

A. Time within which hearing is to be held

No inmate shall be placed in any solitary, isolation or seclusion cell without a prior hearing unless (1) the inmate's conduct poses a serious, immediate and substantial threat to the safety of himself or others or security of the institution, and (2) the circumstances are such as to demonstrate strong probability of guilt, and (3) there is an appropriate investigation or due inquiry to assure that the punishment is not arbitrary or irrational.

Whenever a hearing is required, it shall be held within forty-eight (48) hours (within twenty-four (24) hours if at all possible in the case of use of a strip cell as provided in Part II(A)) except that if any Saturday, Sunday or holiday falls within such forty-eight hour or lesser period, the hearing shall take place on the Monday following any such Saturday or Sunday, or on the day following any such holiday, as the case may be.

B. Notice of charges

Written notice of charges shall be given at least twenty-four (24) hours before the hearing except when the hearing is required by this Decree to be held in less than forty-eight hours, in which event such notice shall be given at least twelve hours before the hearing. Any such notice requirement may be waived by the inmate involved. The

notice shall state the particular law or Jail Rule allegedly violated, a description of the alleged misconduct, names of witnesses and the date of the hearing.

C. Hearing officer

The hearing shall be held before a hearing officer who shall be a member of the Maryland Bar, who shall be selected by and be responsible to the Jail Board, and who shall not be under the jurisdiction of the warden.

D. Representation of inmate

The inmate involved shall have the right to be represented at the hearing either by a member of the bar, or by a counsel-substitute such as a law student, a Jail employee or another inmate. If an inmate states in writing that he desires counsel or counsel-substitute and that he is not able to obtain the same, the hearing officer shall select and appoint either counsel or counsel-substitute for him as the hearing officer shall determine. The hearing officer shall have discretionary authority to refuse to permit any person to act as counsel-substitute if the hearing officer has good reason to believe such person's representation will obstruct or adversely affect the holding of a fair hearing.

E. Procedure

The inmate involved shall have the right (if represented, by his representative; if not represented, acting on his own behalf) to present relevant evidence and witnesses and the right to confront, question and cross-examine his accusers and any other witness.

F. Record of hearing

Effective August 1, 1972,[15] the hearing shall be recorded by such means as are selected by the Jail Board. A record of the same shall be preserved and be reasonably available to the inmate involved and with his consent to any person and with or without his consent, for use by any governmental official in accordance with law.

G. Authority of hearing officer

A hearing officer shall hear the evidence in cases brought before him, have the authority to limit evidence on the basis of relevancy and materiality, not be otherwise bound by the rules of evidence, determine the guilt or innocence of the inmate accused of an infraction of law or of the Jail Rules, find any such inmate guilty of such charge only upon the basis of clear and convincing evidence, and either affirm, modify, or reverse as he shall determine in his discretion, subject to the provisions of all applicable laws and Jail Rules, the action taken which is the subject of the hearing. In the exercise of such authority, the hearing officer, by way of illustration and not by way of limitation, may counsel, or warn, or reprimand the inmate involved, or order the inmate's relocation to another section in the Jail, or the loss by the inmate of one or more privileges for a specified time, or the placing of the inmate in isolation, segregated confinement, or lock-up, for a specified time, or any combination thereof. The hearing officer shall record his decision and the reasons for the same.

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[15] Future date needed to provide time to implement provision.

H. The severity of any determination by a hearing officer may not be increased by any official of the Jail; however, any such determination may be lightened, reduced, or suspended.

I. After a hearing has been held, the inmate involved shall not again be charged with an infraction growing out of the same factual occurrence which was the basis of such hearing.

J. Any inmate shall have the right to address and have promptly transmitted in a selaed envelope, a written communication to a hearing officer, including, *inter alia*, a request for a hearing. If the hearing officer determines that the inmate is entitled under the Jail Rules to a hearing, he shall hols such hearing as required by those Rules. If the hearing officer determines that the inmate is not so entitled to a hearing, he shall promptly advise the inmate and the Jail Board in writing to that effect.

APPENDIX C

AFFIDAVIT

District :
of : SS
Columbia :

Eugene N. Barkin, being duly sworn, deposes and says:

1. I am General Counsel of the United States Bureau of Prisons.

2. In 1965, I, along with Professor Paul Wilson of the University of Kansas, School of Law and Professor James Vorenberg, of the Harvard Law School, who was then Director of the Office of Criminal Justice of the United States Department of Justice, initiated the first law school legal assistance program for inmates in the United States. Since that date, our office helped initiate and has kept in contact with a number of other legal assistance programs for inmates.

3. To the best of my knowledge, there are at present, at least the following legal assistance programs in existence relating to federal institutions.

Institution	Program
United States Penitentiary Atlanta, Georgia	Emory University Law School[16]
United States Penitentiary Leavenworth, Kansas	University of Kansas School of Law

[16] I have recently been advised that Emory is closing in January, 1974.

Institution	Program
United States Penitentiary McNeil Island, Steilacoom Washington	Washington University School of Law
United States Penitentiary Terre Haute, Indiana	Indiana University School of Law
Federal Reformatory for Women Alderson, West Virginia	Washington & Lee Law School
Federal Reformatory El Reno, Oklahoma	University of Oklahoma
Federal Reformatory Petersburg, Virginia	William & Mary Law School
Federal Correctional Institu- tion Danbury, Connecticut	Yale University Law School
Federal Correctional Institu- tion Milan, Michigan	Michigan University Law School
Federal Correctional Institu- tion Sandstone, Minnesota	Minnesota University Law School
Federal Correctional Institu- tion Terminal Island, California	University of California, Loa Angeles Law School
Federal Correctional Institu- tion Texarkana, Texas	University of Arkansas Law School

4. Arrangements are being made for the initiation of a legal assistance program for a new federal institution in Oxford, Wisconsin, with the University of Wisconsin Law School.

5. In addition, the Bureau will be opening a new institution at Pleasanton, California, and is in the process of taking over the clinical center for narcotic addicts at Lexington, Kentucky. Contracts will be made with law schools in the area of San Francisco, to render legal assistance to inmates at Pleasanton, and with the University of Kentucky for those at Lexington, Kentucky. Further, preliminary contacts have been made with the University of West Virginia School of Law for legal assistance to the students at the Kennedy Youth Center, Morgantown, West Virginia.

6. The Bureau of Prisons has not limited the programs in rendering assistance to inmates with "corrections problems," *e.g.*, issues that may arise between inmate and the Bureau of Prisons, particular institutions, and the Board of Parole. Based on my own information concerning the programs and a telephone canvass of some of our institutions, it is my understanding that, with the apparent exception of three programs (Petersburg; Terminal Island;[17] and Texarkana), law school assistance programs do render assistance with regard to "corrections problems."

7. Appendix A to the article "Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process" by Jacob and Sharma, 18 Kansas Law Review 493, 625 (1970) indicated that only one of the then-existing programs was limited to post-conviction remedies, that at the University of Indiana-Bloomington. Even with regard to that program, information received by the Bureau subsequent to the Jacob and Sharma article states that, although most of the work at that program is in the area

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[17] At Terminal Island, it appears that some work in the area of corrections problems is handled by the Public Defender.

of post-conviction remedies, the program does not hesitate to respond to other matters such as administrative transfer of prisoners between federal institutions and a class action involving credit on sentence.

8. The Medical Center for Federal Prisoners at Springfield, Missouri, formerly had a program with the Law School of the University of Missouri at Kansas City. As of September 1971, legal assistance to prisioners has been rendered by the Office of the Federal Public Defender.

/s/ EUGENE N. BARKIN
Eugene N. Barkin, General
Counsel
Bureau of Prisons

Subscribed and sworn to before me this 20th day of December 1973.

/s/ EDMUND G. CHAMBERLAIN, JR.
Notary Public
Edmund G. Chamberlain, Jr.
Notary Public - District of Columbia
My Commission expires June 14, 1976

APR 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

DENIED 4-29-74

No. 73-679

CHARLES L. WOLFF, JR., *et al.*,

Petitioners,

—v.—

ROBERT O. McDONNELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND

BRIEF OF THE OHIO STATE UNIVERSITY COLLEGE OF LAW CLINICAL PROGRAMS, *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES L. WOLFF, JR., *et al.*,

Petitioners,

—v.—

ROBERT O. McDONNELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE OHIO STATE UNIVERSITY COLLEGE OF LAW CLINICAL PROGRAMS, *AMICUS CURIAE*

Statement of Interest and Motion for Leave to File Brief Late as *Amicus Curiae*

The Ohio State University College of Law Clinical Programs is one of the oldest law school clinical programs in the United States. As part of its function of educating law students in the effective representation of individuals, it offers courses, involving both classroom instruction and representation under staff attorneys, in post-conviction remedies and representation of incarcerated persons. While the clients of the Ohio State University College of Law Clinical Programs are primarily from Ohio, it

regularly receives correspondence from inmates incarcerated elsewhere in the United States. A recurrent complaint in prisoners' correspondence is the perception that discipline is unfairly administered and, more particularly, that it functions in the interests of the prison guards and prison administrators, rather than adjudicating facts.

These recurrent complaints of "kangaroo courts" have led us to make inquiry into the impartiality with which prison discipline is administered and to appear as counsel in one case raising these issues. *Firman* v. *Cooper*, Civil No. 73-193, S.D.O., E.D. (disciplinary transfer) (decision pending).

We believe that the Court's decision in this case may have a substantial impact on the fairness of prison disciplinary proceedings in Ohio[1] and believe that this brief may aid the Court's deliberations.

Consent for the filing of this brief has been obtained both from counsel for respondent, whose position we support, and from counsel for petitioner. Through an error, we were not aware of the deadline for filing of this brief until it had passed and, as a result, leave is sought to file this brief out of time.

---

[1] To date, there has been no reported Court decision extending due process requirements to prison discipline proceedings in Ohio. A study of Ohio prisons documented the fact that disciplinary boards or "Rules Infractions Boards" were staffed by guards and guard officers, were a "significant source of inmate complaints" and were "perceived as 'kangaroo courts.'" Ohio Citizens Task Force on Corrections, Final Report to the Governor, D9-D10 (1971).

Introduction

There has been an unnecessarily long delay in implementing the axiomatic position that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin* v. *Reichard,* 143 F.2d 443 (6th Cir. 1944). See also *Jackson* v. *Bishop,* 404 F.2d 571 (8th Cir. 1968). Nevertheless, the lower federal courts, including the Eighth Circuit in this case, have finally recognized, following this Court's decisions in such cases as *Morrisey* v. *Brewer,* 408 U.S. 471 (1972) and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), that due process of law is a constitutionally mandated prerequisite to the imposition of the more severe forms of prison discpiline. See, e.g., *Gomes* v. *Travisono,* 490 F.2d 1209 (1st Cir. 1973); *United States ex rel. Miller* v. *Twomey,* 479 F.2d 701 (7th Cir. 1973); *Nolan* v. *Scafati,* 430 F.2d 548 (1st Cir. 1970); *Hoitt* v. *Vitek,* 361 F. Supp. 1238 (D.N.H. 1973); *Sands* v. *Wainwright,* 357 F. Supp. 1062 (M.D. Fla. 1973), vacated on other grounds, —— F.2d —— (5th Cir. 1974); *Allen* v. *Nelson,* 354 F. Supp. 505 (N.D. Cal. 1973), aff'd, 484 F.2d 960 (9th Cir. 1973); *Landman* v. *Royster,* 333 F. Supp. 621 (E.D. Va. 1971). The debatable—and difficult—question is just what constitutes due process in a prison.

It is the purpose of this brief to deal with one aspect of due process of law in prison disciplinary proceedings—the necessity of an impartial decision-maker. Several of the lower courts, following suggestions made in cases like *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973), have adopted a flexible or "sliding scale" approach to due process of law,

keying the minimum procedural requirements to the particular deprivation before the Court. See, e.g., *Gomes* v. *Travisono*, 487 F.2d 1215 (1st Cir. 1973); *Palmigiano* v. *Baxter*, 487 F.2d 1280 (1st Cir. 1973). The Court of Appeals' decision in this case is in that category.

It is our view, however, that at least with respect to the decision-maker, impartiality is a constant requirement of due process of law. Thus, a partial decision-maker's denial of one day's "good time" is no more acceptable than a partial decision-maker's order to spend a full year in solitary confinement. Since we intend to demonstrate *ante* that certain categories of prison personnel are necessarily partial in disciplinary proceedings involving inmates, we believe it follows that in all cases such persons are precluded from serving as decision-makers in prison disciplinary proceedings. Furthermore, while the Court has often expressed a preference for case-by-case delineation of rights, strong policies are served by a clear definition of impartiality in this case. Our observation of the slow compliance of prison administrators in Ohio with decisional trends in this Court and elsewhere convinces us that a clear decision by this Court is necessary for the Constitution to apply equally to all inmates throughout the country.

ARGUMENTS

IMPARTIALITY

The Court long ago recognized that the impartiality of the fact-finder or decision-maker is an absolute prerequisite to due process of law. See, e.g., *Moore* v. *Dempsey,* 261 U.S. 86 (1923); *Tumey* v. *Ohio,* 273 U.S. 510 (1927); *Ward* v. *Monroeville,* 409 U.S. 57 (1972). In general, it can be concluded that any conflict of interest "which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the defendant" makes a potential decision-maker partial from a constitutional point of view. *In re Murchison,* 349 U.S. 136 (1955). This conflict of interest includes situations of potential economic gain, *Gibson* v. *Berryhill,* 411 U.S. 564 (1973) and situations in which the initiator of the complaint seeks to act as trier. *In re Murchison,* 349 U.S. 136 (1955). In addition, it includes the more subtle situations in which executive responsibility for a particular subject matter is inconsistent with the impartiality necessary for an adjudicatory function. *Ward* v. *Monroeville,* 409 U.S. 57 (1972). Finally, recognized loyalties to a particular group may often amount to bias. As Justice Jackson accurately observed: "[m]en are more often bribed by their loyalties and ambitions than by money." *United States* v. *Wunderlich,* 342 U.S. 98, 103 (1951) (dissenting opinion).

In general, it follows from the foregoing principles that, in a prison as in any other administrative setting, persons responsible for the particular charges, persons who have loyalties to those filing the charges or persons in

executive or operational positions should be precluded from acting as decision-makers because of the odor of bias.

An outstanding model of fairness in administrative proceedings which can serve as an analogy is the Administrative Procedure Act, 60 Stat. 237 (1946), as amended 5 U.S.C. §§551-59, 701-06, 1305, 3105, 3344, 6362, 7562. The proposals leading to its adoption recognized that the key to procedural fairness lay in impartial decision-makers and, as a result, urged absolute separation of the hearing examiners from the agencies whose cases they would decide.[2] Thereafter, this position was softened because it would be beneficial to have hearing examiners gain expertise in the subject matter of particular agencies.[3] That was the only concession made. The Administrative Procedure Act, while permitting agency appointment of hearing examiners, precludes agency control over their tenure, compensation or removal and precludes them from performing administrative functions inconsistent with their roles as impartial administrators.[4]

The Administrative Procedure Act is not, of course, applicable to state prison proceedings, although the strength of the analogy is pointed up by the recent decision of the United States Court of Appeals for the Seventh Circuit holding its provisions applicable to federal parole board proceedings. See *King* v. *United States*, —— F.2d ——, 15 B.N.A. Crim. L. Rep. 2025 (7th Cir. Mar. 17, 1974).

Applying the basic concepts of fairness expressed in the Administrative Procedure Act to the prison context, it

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[2] ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, Final Report 47 (1941).

[3] *Id.* at 47.

[4] 5 U.S.C. §§3105, 7521, 5362 *formerly* ADMINISTRATIVE PROCEDURE ACT §11 (1946).

seems clear that both prison administrators and, especially, prison guards or other custodial personnel are precluded, by their functions, from being impartial decision-makers.

A recent study by a Stanford psychologist suggests that the polarization within the prison is so strong that no one in a custodial position can be presumed to be impartial toward the inmates. The study placed twenty-four Stanford "cream of the crop" students in a simulated prison atmosphere in which twelve were to assume the role of prisoners and the other twelve the role of custodial officers. Although only one-third of the guards reacted as tyrannical in their arbitrary use of power, the other two-thirds would not break rank and interfere with such activity.[8]

---

[8] Zimbardo, *The Psychological Power and Pathology of Imprisonment*, in BEHAVIOR DISORDERS: PERSPECTIVES AND TRENDS 151 (Milton and Wahler eds. 1973):

> About a third of the guards became tyrannical in their arbitrary use of power, in enjoying their control over other people. They were corrupted by the power of their roles and became quite inventive in their techniques of breaking the spirit of the prisoners and making them feel they were worthless. Some of the guards merely did their jobs as "tough but fair" correctional officers. Several were "good guards" from the prisoners' point of view, since they did them small favors and were friendly. However, no "good guard" or any other one ever interfered with a command by any of the "bad guards"; they never intervened on the side of the prisoners; they never told the others to ease off because it was only an experiment; and they never even came to me as prison superintendent or experimenter in charge to complain. In part, they were "good" because the others were "bad"; they needed the others to help establish their own egos in a positive light. In a sense, they perpetuated the prison more than the other guards because their own needs to be liked prevented them from disobeying or violating the implicit guard's code. At the same time, the act of befriending the prisoners created a social reality which made the prisoners less likely to rebel.

See also, Zimbardo, *A Pirandellian Prison*, N. Y. TIMES, Apr. 8, 1973, Section 6, p. 38.

A recent study of the effect of the decision in *Morris* v. *Travisono,* 310 F. Supp. 857 (D.R.I. 1970), validating the conclusion that prison personnel cannot function impartially in prison discipline boards. The consent decree entered in *Morris* provided that the Disciplinary Board would consist of a deputy warden and two remaining members from the custody and treatment departments. 310 F. Supp. at 872. The Harvard Center for Criminal Justice reached the following conclusions:

> "The compositional provision of the decree was subjected to substantial criticism by both staff and inmates. The staff problem of having to use classification counselors (who were also supposed to represent inmates) on the Board to meet the treatment member requirement, has already been discussed.[88] On the other hand, the inmates simply felt that the Board was unfairly constituted. In citing the composition of the Board as the most unfair aspect of the disciplinary process at the ACI,[89] the inmates characterized the board as a 'kangaroo court' and a 'biased board' which did not 'know how to be fair.' They alleged that the Board members held 'grudges' and showed favoritism, and they particularly criticized the presence of guards on the Board[90] as well as the absence of blacks, in alleging racial prejudice.
>
> The impartiality of the Disciplinary Board may be impeded by several factors. In a small, closed institution like the ACI, staff members are familiar with many of the inmates and usually bring to the Board hearings a great deal of personal knowledge about a particular inmate and sometimes bias, either favorable or unfavorable, toward him. The result often is that

the disciplinary decision is made on the basis of the personal and usually unarticulated feelings of a staff member, rather than on the facts presented at the hearing.[91]

Board members may not act impartially because they feel that their duty is to support the staff in all cases. As one Board member put it, 'The philosophy in the past has been always back up your officers, whether they are right or wrong.' Such a view is particularly harmful to the integrity of the disciplinary process, when, as in most contested hearings, the evidence consists mainly of conflicting testimony by the prisoner and a staff member.

Another factor which may affect the disposition of the case is the inmate's behavior before the Board. An inmate who is 'defiant' or had a 'hard attitude' or insists on his 'rights' is unlikely to win the sympathy of the Board.

These factors affecting the Board's decisions—personal knowledge of, and sometimes bias toward, the inmate defendant, tendency to support staff, and reaction to inmate attitude before the Board[92]—combine to make the prison disciplinary process something less than a hearing before impartial arbiters based only upon evidence and argument in open court.[93]

It may be that some of these problems could be solved by changing the composition of the Board.[94] The inmates interviewed had numerous suggestions for such changes: an inmate jury, one inmate on the Board, the same people on every Board, the Warden or Assistant Warden on the Board, fewer guards present, and outsiders on the Board. However, with the possible exception of including an outsider, these pro-

posals do not seem designed to create a more impartial Board. It is difficult to see how a change among prison staff would improve matters, since almost all prison personnel have personal knowledge of many of the inmates and are subject to similar pressures with regard to staff support. Even adding inmates to the Board would not remedy the problem of personal knowledge and possible bias toward the charged prisoners. While the use of an outsider would solve that difficulty (at least temporarily, *i.e.*, until he gets to know the inmates), such a move would create a whole variety of problems, some of which have already been referred to in connection with the representation issue,[95] and others of which will be discussed in more detail below.[96] "

Harvard Center for Criminal Justice, Judicial Intervention in Prison Discipline, 63 J. Crim. L., C. and P.S., 200, 210-211 (1972) (footnotes omitted).

A further point must be added in considering the proper persons to act as decision-makers. It is clear that some aspects of procedure traditionally associated with court proceedings will be dispensed with in prison disciplinary proceedings because they are thought to be inappropriate. Others will be dispensed with because inconsistent with the prison *milieu. To the extent that traditional safeguards are dispensed with, the importance of the decision-maker in assuring fairness is magnified.*

THE LOWER COURT CASES

In general, there is neither consistency nor clarity in the recent lower court decisions considering how impartiality is to be achieved in prison disciplinary bodies. Roughly, they fall into four categories.

The first category holds, as suggested in this brief, that minimal constitutional standards exclude, in addition to participants, witnesses or persons otherwise involved and persons with a personal interest of any kind in the outcome. See, e.g., *Sands* v. *Wainwright*, 357 F. Supp. 1062, 1084 (M.D. Fla. 1973), vacated on other grounds, —— F.2d —— (5th Cir. 1974). The logic of this position would permit persons employed by the State's penal complex, but would exclude those who serve in supervisory, treatment or custodial capacities in the particular prison.

A second category of cases insists that there be at least one truly impartial decision-maker, but permits that person to be joined in a body by more partial persons, such as wardens, guards or treatment personnel, who may constitute the majority. See, e.g., *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D.N.H. 1973); *Collins* v. *Hancock*, 354 F. Supp. 1253, 1259 (D.N.H. 1973); *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970).

A third category dispenses with the need for an outsider to the prison, so long as the disciplinary body excludes persons who initiated the charges or participated in or witnessed the events. See, e.g., *United States ex rel. Neal* v. *Wolfe*, 346 F. Supp. 569 (E.D. Pa. 1972); *Landman* v. *Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971); *Clutchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy* v.

Cannon, 328 F. Supp. 165 (D. Md. 1971). A significant criticism of both the second and third categories is that, in permitting "field unit" employees to participate in disciplinary bodies, the courts authorize inclusion of persons who, in many instances would be disqualified if called to serve as one of twelve in a jury trial. A prison guard, for example, would be excluded from jury service for cause in any case in which another prison guard was a key witness or a victim or in which his role as prison guard gave him an incentive to decide in a particular way. See, e.g., *State* v. *Jackson*, 43 N.J. 148, 203 A.2d 1 (1964), cert. den. sub nom. *Ravenell* v. *New Jersey*, 379 U.S. 982 (1965); *People* v. *Abbott*, 47 Cal. 2d 362, 303 P.2d 730 (1956); 47 Am. Jur. 2d *Jury* 3321 (1969); *Crawford* v. *United States*, 212 U.S. 183 (1909); *Frazier* v. *United States*, 335 U.S. 497 (1948).

The fourth category of cases either pays lip service to the impartiality requirement without giving it any content, see, e.g., *Gomes* v. *Travisono*, 490 F.2d 1209 (1st Cir. 1973); *United States ex rel. Miller* v. *Twomey*, 479 F.2d 701 (7th Cir. 1973), or totally disregards it. See, e.g., *United States ex rel. Walker* v. *Mancusi*, 467 F.2d 51 (2nd Cir. 1972); *Gray* v. *Creamer*, 465 F.2d 179 (3rd Cir. 1972); *Sostre* v. *McGinnis*, 442 F.2d 178 (2nd Cir. 1971), cert. denied sub nom. *Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

The approximate conclusion to be drawn from the cases just discussed is that the lower courts are in substantial disarray on the subject of impartiality and that it is necessary for this Court to give some guidance so that the heart of due process of law does not change markedly from place to place. Moreover, while careful recognition must be given to the exigencies of emergency situations,

see, e.g., *Gomes* v. *Travisono*, 353 F. Supp. 457 (D.R.I. 1973), modified, 490 F.2d 1209 (1st Cir. 1973), in general the lower courts have gone awry in failing to recognize the extent to which prison disciplinary proceedings are akin to other administrative proceedings. Following the principles ordinarily applicable to administrative proceedings, a much higher degree of impartiality, probably requiring an independent hearing examiner attached to the central office, would be mandated. When one considers the serious nature of consequences often imposed by prison administrative bodies, see, e.g., *Allen* v. *Nelson*, 354 F. Supp. 505 (N.D. Cal. 1973), aff'd, 484 F.2d 960 (9th Cir. 1973) (long-term segregation), and the likelihood that other, traditional aspects of due process of law are to be dispensed with, cf., *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), the kind of impartiality ordinarily demanded of traditional administrative agencies should be the floor for due process of law in the prisons.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court find for respondents and, in the course of so finding, issue clear guidelines to require a significant degree of impartiality in prison disciplinary bodies.

Respectfully submitted,

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Counsel for Amicus Curiae

Assisted by:
DIXIE MOSS

Affidavit of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

....., being duly sworn, deposes and says that on April 19, 1974, ... caused 3 copies of the attached brief of *amicus curiae* to be mailed to counsel for petitioners and 3 copies to be mailed to counsel for respondents, by depositing in a United States mail box, postage paid, to

ATTORNEY GENERAL OF NEBRASKA
State Capitol
1445 K Street
Lincoln, Nebraska 68509

DOUGLAS F. DUCHEK
CLINE, WILLIAMS, *et al.*
1900 First National Bank Building
Lincoln, Nebraska 68508

.....

Duly sworn to before me this
..... day of April, 1974

.....
Notary Public

FREE COPY

APR 19 1974

MICHAEL RODAK, JR., CLERK

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These recurrent complaints of "kangaroo courts" have led us to make inquiry into the impartiality with which prison discipline is administered and to appear as counsel in one case raising these issues. *Firman* v. *Cooper,* Civil No. 73-193, S.D.O., E.D. (disciplinary transfer) (decision pending).

We believe that the Court's decision in this case may have a substantial impact on the fairness of prison disciplinary proceedings in Ohio[1] and believe that this brief may aid the Court's deliberations.

Consent for the filing of this brief has been obtained both from counsel for respondent, whose position we support, and from counsel for petitioner. Through an error, we were not aware of the deadline for filing of this brief until it had passed and, as a result, leave is sought to file this brief out of time.

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[1] To date, there has been no reported Court decision extending due process requirements to prison discipline proceedings in Ohio. A study of Ohio prisons documented the fact that disciplinary boards or "Rules Infractions Boards" were staffed by guards and guard officers, were a "significant source of inmate complaints" and were "perceived as 'kangaroo courts.'" Ohio Citizens Task Force on Corrections, Final Report to the Governor, D9-D10 (1971).

Introduction

There has been an unnecessarily long delay in implementing the axiomatic position that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin* v. *Reichard,* 143 F.2d 443 (6th Cir. 1944). See also *Jackson* v. *Bishop,* 404 F.2d 571 (8th Cir. 1968). Nevertheless, the lower federal courts, including the Eighth Circuit in this case, have finally recognized, following this Court's decisions in such cases as *Morrisey* v. *Brewer,* 408 U.S. 471 (1972) and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), that due process of law is a constitutionally mandated prerequisite to the imposition of the more severe forms of prison discpiline. See, e.g., *Gomes* v. *Travisono,* 490 F.2d 1209 (1st Cir. 1973); *United States ex rel. Miller* v. *Twomey,* 479 F.2d 701 (7th Cir. 1973); *Nolan* v. *Scafati,* 430 F.2d 548 (1st Cir. 1970); *Hoitt* v. *Vitek,* 361 F. Supp. 1238 (D.N.H. 1973); *Sands* v. *Wainwright,* 357 F. Supp. 1062 (M.D. Fla. 1973), vacated on other grounds, —— F.2d —— (5th Cir. 1974); *Allen* v. *Nelson,* 354 F. Supp. 505 (N.D. Cal. 1973), aff'd, 484 F.2d 960 (9th Cir. 1973); *Landman* v. *Royster,* 333 F. Supp. 621 (E.D. Va. 1971). The debatable—and difficult—question is just what constitutes due process in a prison.

It is the purpose of this brief to deal with one aspect of due process of law in prison disciplinary proceedings—the necessity of an impartial decision-maker. Several of the lower courts, following suggestions made in cases like *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973), have adopted a flexible or "sliding scale" approach to due process of law,

keying the minimum procedural requirements to the particular deprivation before the Court. See, e.g., *Gomes* v. *Travisono*, 487 F.2d 1215 (1st Cir. 1973); *Palmigiano* v. *Baxter*, 487 F.2d 1280 (1st Cir. 1973). The Court of Appeals' decision in this case is in that category.

It is our view, however, that at least with respect to the decision-maker, impartiality is a constant requirement of due process of law. Thus, a partial decision-maker's denial of one day's "good time" is no more acceptable than a partial decision-maker's order to spend a full year in solitary confinement. Since we intend to demonstrate *ante* that certain categories of prison personnel are necessarily partial in disciplinary proceedings involving inmates, we believe it follows that in all cases such persons are precluded from serving as decision-makers in prison disciplinary proceedings. Furthermore, while the Court has often expressed a preference for case-by-case delineation of rights, strong policies are served by a clear definition of impartiality in this case. Our observation of the slow compliance of prison administrators in Ohio with decisional trends in this Court and elsewhere convinces us that a clear decision by this Court is necessary for the Constitution to apply equally to all inmates throughout the country.

ARGUMENTS

IMPARTIALITY

The Court long ago recognized that the impartiality of the fact-finder or decision-maker is an absolute prerequisite to due process of law. See, e.g., *Moore* v. *Dempsey,* 261 U.S. 86 (1923); *Tumey* v. *Ohio,* 273 U.S. 510 (1927); *Ward* v. *Monroeville,* 409 U.S. 57 (1972). In general, it can be concluded that any conflict of interest "which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the defendant" makes a potential decision-maker partial from a constitutional point of view. *In re Murchison,* 349 U.S. 136 (1955). This conflict of interest includes situations of potential economic gain, *Gibson* v. *Berryhill,* 411 U.S. 564 (1973) and situations in which the initiator of the complaint seeks to act as trier. *In re Murchison,* 349 U.S. 136 (1955). In addition, it includes the more subtle situations in which executive responsibility for a particular subject matter is inconsistent with the impartiality necessary for an adjudicatory function. *Ward* v. *Monroeville,* 409 U.S. 57 (1972). Finally, recognized loyalties to a particular group may often amount to bias. As Justice Jackson accurately observed: "[m]en are more often bribed by their loyalties and ambitions than by money." *United States* v. *Wunderlich,* 342 U.S. 98, 103 (1951) (dissenting opinion).

In general, it follows from the foregoing principles that, in a prison as in any other administrative setting, persons responsible for the particular charges, persons who have loyalties to those filing the charges or persons in

executive or operational positions should be precluded from acting as decision-makers because of the odor of bias.

An outstanding model of fairness in administrative proceedings which can serve as an analogy is the Administrative Procedure Act, 60 Stat. 237 (1946), as amended 5 U.S.C. §§551-59, 701-06, 1305, 3105, 3344, 6362, 7562. The proposals leading to its adoption recognized that the key to procedural fairness lay in impartial decision-makers and, as a result, urged absolute separation of the hearing examiners from the agencies whose cases they would decide.[2] Thereafter, this position was softened because it would be beneficial to have hearing examiners gain expertise in the subject matter of particular agencies.[3] That was the only concession made. The Administrative Procedure Act, while permitting agency appointment of hearing examiners, precludes agency control over their tenure, compensation or removal and precludes them from performing administrative functions inconsistent with their roles as impartial administrators.[4]

The Administrative Procedure Act is not, of course, applicable to state prison proceedings, although the strength of the analogy is pointed up by the recent decision of the United States Court of Appeals for the Seventh Circuit holding its provisions applicable to federal parole board proceedings. See *King* v. *United States*, —— F.2d ——, 15 B.N.A. Crim. L. Rep. 2025 (7th Cir. Mar. 17, 1974).

Applying the basic concepts of fairness expressed in the Administrative Procedure Act to the prison context, it

---

[2] ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, Final Report 47 (1941).

[3] *Id.* at 47.

[4] 5 U.S.C. §§3105, 7521, 5362 *formerly* ADMINISTRATIVE PROCEDURE ACT §11 (1946).

seems clear that both prison administrators and, especially, prison guards or other custodial personnel are precluded, by their functions, from being impartial decision-makers.

A recent study by a Stanford psychologist suggests that the polarization within the prison is so strong that no one in a custodial position can be presumed to be impartial toward the inmates. The study placed twenty-four Stanford "cream of the crop" students in a simulated prison atmosphere in which twelve were to assume the role of prisoners and the other twelve the role of custodial officers. Although only one-third of the guards reacted as tyrannical in their arbitrary use of power, the other two-thirds would not break rank and interfere with such activity.[5]

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[5] Zimbardo, *The Psychological Power and Pathology of Imprisonment*, in BEHAVIOR DISORDERS: PERSPECTIVES AND TRENDS 151 (Milton and Wahler eds. 1973):

> About a third of the guards became tyrannical in their arbitrary use of power, in enjoying their control over other people. They were corrupted by the power of their roles and became quite inventive in their techniques of breaking the spirit of the prisoners and making them feel they were worthless. Some of the guards merely did their jobs as "tough but fair" correctional officers. Several were "good guards" from the prisoners' point of view, since they did them small favors and were friendly. However, no "good guard" or any other one ever interfered with a command by any of the "bad guards"; they never intervened on the side of the prisoners; they never told the others to ease off because it was only an experiment; and they never even came to me as prison superintendent or experimenter in charge to complain. In part, they were "good" because the others were "bad"; they needed the others to help establish their own egos in a positive light. In a sense, they perpetuated the prison more than the other guards because their own needs to be liked prevented them from disobeying or violating the implicit guard's code. At the same time, the act of befriending the prisoners created a social reality which made the prisoners less likely to rebel.

See also, Zimbardo, *A Pirandellian Prison*, N. Y. TIMES, Apr. 8, 1973, Section 6, p. 38.

A recent study of the effect of the decision in *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970), validating the conclusion that prison personnel cannot function impartially in prison discipline boards. The consent decree entered in *Morris* provided that the Disciplinary Board would consist of a deputy warden and two remaining members from the custody and treatment departments. 310 F. Supp. at 872. The Harvard Center for Criminal Justice reached the following conclusions:

> "The compositional provision of the decree was subjected to substantial criticism by both staff and inmates. The staff problem of having to use classification counselors (who were also supposed to represent inmates) on the Board to meet the treatment member requirement, has already been discussed.[88] On the other hand, the inmates simply felt that the Board was unfairly constituted. In citing the composition of the Board as the most unfair aspect of the disciplinary process at the ACI,[89] the inmates characterized the board as a 'kangaroo court' and a 'biased board' which did not 'know how to be fair.' They alleged that the Board members held 'grudges' and showed favoritism, and they particularly criticized the presence of guards on the Board[90] as well as the absence of blacks, in alleging racial prejudice.
>
> The impartiality of the Disciplinary Board may be impeded by several factors. In a small, closed institution like the ACI, staff members are familiar with many of the inmates and usually bring to the Board hearings a great deal of personal knowledge about a particular inmate and sometimes bias, either favorable or unfavorable, toward him. The result often is that

the disciplinary decision is made on the basis of the personal and usually unarticulated feelings of a staff member, rather than on the facts presented at the hearing.[91]

Board members may not act impartially because they feel that their duty is to support the staff in all cases. As one Board member put it, 'The philosophy in the past has been always back up your officers, whether they are right or wrong.' Such a view is particularly harmful to the integrity of the disciplinary process, when, as in most contested hearings, the evidence consists mainly of conflicting testimony by the prisoner and a staff member.

Another factor which may affect the disposition of the case is the inmate's behavior before the Board. An inmate who is 'defiant' or had a 'hard attitude' or insists on his 'rights' is unlikely to win the sympathy of the Board.

These factors affecting the Board's decisions—personal knowledge of, and sometimes bias toward, the inmate defendant, tendency to support staff, and reaction to inmate attitude before the Board[92]—combine to make the prison disciplinary process something less than a hearing before impartial arbiters based only upon evidence and argument in open court.[93]

It may be that some of these problems could be solved by changing the composition of the Board.[94] The inmates interviewed had numerous suggestions for such changes: an inmate jury, one inmate on the Board, the same people on every Board, the Warden or Assistant Warden on the Board, fewer guards present, and outsiders on the Board. However, with the possible exception of including an outsider, these pro-

> posals do not seem designed to create a more impartial Board. It is difficult to see how a change among prison staff would improve matters, since almost all prison personnel have personal knowledge of many of the inmates and are subject to similar pressures with regard to staff support. Even adding inmates to the Board would not remedy the problem of personal knowledge and possible bias toward the charged prisoners. While the use of an outsider would solve that difficulty (at least temporarily, *i.e.*, until he gets to know the inmates), such a move would create a whole variety of problems, some of which have already been referred to in connection with the representation issue,[95] and others of which will be discussed in more detail below.[96] "

Harvard Center for Criminal Justice, Judicial Intervention in Prison Discipline, 63 J. Crim. L., C. and P.S., 200, 210-211 (1972) (footnotes omitted).

A further point must be added in considering the proper persons to act as decision-makers. It is clear that some aspects of procedure traditionally associated with court proceedings will be dispensed with in prison disciplinary proceedings because they are thought to be inappropriate. Others will be dispensed with because inconsistent with the prison *milieu. To the extent that traditional safeguards are dispensed with, the importance of the decision-maker in assuring fairness is magnified.*

THE LOWER COURT CASES

In general, there is neither consistency nor clarity in the recent lower court decisions considering how impartiality is to be achieved in prison disciplinary bodies. Roughly, they fall into four categories.

The first category holds, as suggested in this brief, that minimal constitutional standards exclude, in addition to participants, witnesses or persons otherwise involved and persons with a personal interest of any kind in the outcome. See, e.g., *Sands* v. *Wainwright*, 357 F. Supp. 1062, 1084 (M.D. Fla. 1973), vacated on other grounds, —— F.2d —— (5th Cir. 1974). The logic of this position would permit persons employed by the State's penal complex, but would exclude those who serve in supervisory, treatment or custodial capacities in the particular prison.

A second category of cases insists that there be at least one truly impartial decision-maker, but permits that person to be joined in a body by more partial persons, such as wardens, guards or treatment personnel, who may constitute the majority. See, e.g., *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D.N.H. 1973); *Collins* v. *Hancock*, 354 F. Supp. 1253, 1259 (D.N.H. 1973); *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970).

A third category dispenses with the need for an outsider to the prison, so long as the disciplinary body excludes persons who initiated the charges or participated in or witnessed the events. See, e.g., *United States ex rel. Neal* v. *Wolfe*, 346 F. Supp. 569 (E.D. Pa. 1972); *Landman* v. *Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971); *Clutchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy* v.

Cannon, 328 F. Supp. 165 (D. Md. 1971). A significant criticism of both the second and third categories is that, in permitting "field unit" employees to participate in disciplinary bodies, the courts authorize inclusion of persons who, in many instances would be disqualified if called to serve as one of twelve in a jury trial. A prison guard, for example, would be excluded from jury service for cause in any case in which another prison guard was a key witness or a victim or in which his role as prison guard gave him an incentive to decide in a particular way. See, e.g., *State* v. *Jackson*, 43 N.J. 148, 203 A.2d 1 (1964), cert. den. sub nom. *Ravenell* v. *New Jersey*, 379 U.S. 982 (1965); *People* v. *Abbott*, 47 Cal. 2d 362, 303 P.2d 730 (1956); 47 Am. Jur. 2d *Jury* 3321 (1969); *Crawford* v. *United States*, 212 U.S. 183 (1909); *Frazier* v. *United States*, 335 U.S. 497 (1948).

The fourth category of cases either pays lip service to the impartiality requirement without giving it any content, see, e.g., *Gomes* v. *Travisono*, 490 F.2d 1209 (1st Cir. 1973); *United States ex rel. Miller* v. *Twomey*, 479 F.2d 701 (7th Cir. 1973), or totally disregards it. See, e.g., *United States ex rel. Walker* v. *Mancusi*, 467 F.2d 51 (2nd Cir. 1972); *Gray* v. *Creamer*, 465 F.2d 179 (3rd Cir. 1972); *Sostre* v. *McGinnis*, 442 F.2d 178 (2nd Cir. 1971), cert. denied sub nom. *Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

The approximate conclusion to be drawn from the cases just discussed is that the lower courts are in substantial disarray on the subject of impartiality and that it is necessary for this Court to give some guidance so that the heart of due process of law does not change markedly from place to place. Moreover, while careful recognition must be given to the exigencies of emergency situations,

see, e.g., *Gomes* v. *Travisono*, 353 F. Supp. 457 (D.R.I. 1973), modified, 490 F.2d 1209 (1st Cir. 1973), in general the lower courts have gone awry in failing to recognize the extent to which prison disciplinary proceedings are akin to other administrative proceedings. Following the principles ordinarily applicable to administrative proceedings, a much higher degree of impartiality, probably requiring an independent hearing examiner attached to the central office, would be mandated. When one considers the serious nature of consequences often imposed by prison administrative bodies, see, e.g., *Allen* v. *Nelson*, 354 F. Supp. 505 (N.D. Cal. 1973), aff'd, 484 F.2d 960 (9th Cir. 1973) (long-term segregation), and the likelihood that other, traditional aspects of due process of law are to be dispensed with, cf., *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), the kind of impartiality ordinarily demanded of traditional administrative agencies should be the floor for due process of law in the prisons.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court find for respondents and, in the course of so finding, issue clear guidelines to require a significant degree of impartiality in prison disciplinary bodies.

Respectfully submitted,

MICHAEL E. GELTNER
ROBERT APP
Counsel for Amicus Curiae

Assisted by:
DIXIE MOSS

Affidavit of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

....., being duly sworn, deposes and says that on April 19, 1974, ... caused 3 copies of the attached brief of *amicus curiae* to be mailed to counsel for petitioners and 3 copies to be mailed to counsel for respondents, by depositing in a United States mail box, postage paid, to

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State Capitol
1445 K Street
Lincoln, Nebraska 68509

DOUGLAS F. DUCHEK
CLINE, WILLIAMS, *et al.*
1900 First National Bank Building
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.....

Duly sworn to before me this
..... day of April, 1974

.....
Notary Public

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MAY 17 1974

Supreme Court, U.S.
FILED
MAY 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES L. WOLFF, JR., *et al.*,
Petitioner

v.

ROBERT O. McDONNELL, *et al.*,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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May 2, 1974

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

STATEMENT AND INTRODUCTION

The Court allowed the respondent an additional ten days to file a Supplemental Brief concerning points raised in the Brief for the United States as *Amicus Curiae* at the oral argument of this cause on April 22, 1974.

I.

PRISON DISCIPLINARY PROCEEDINGS ANCHORED TO APPROPRIATE PROCEDURAL DUE PROCESS PROTECTIONS DO NOT IMPEDE LEGITIMATE SOCIETAL OR PRISON ADMINISTRATION INTERESTS.

As counsel for the respondent pointed out in oral argument, certain *amicii* who filed briefs in support of the respondent in this cause have focused precisely on the issue raised by the Solicitor General in the United States' brief that recognizing constitutional protections for prisoners within the context of prison society is not sound penology. In fact, certain of the *amicii* were delegated specific responsibility for briefing these concerns and issues which attach to this type of case and, therefore, referral to the *amicii* briefs allows the respondent to answer certain arguments advanced by the Solicitor General, but not known by the respondent at the time of the filing of his brief.

As stated in the oral argument, the brief of the National Council on Crime and Delinquency as *Amicus Curiae* rebutts sharply and clearly the position advanced by the Solicitor General that procedural due process guarantees of the *Morrissey-Scarpelli* nature are in any fashion antithetical with and to sound correctional practice. It is now recognized that minimum procedural protections designed to result in reliable findings of fact and appropriate impositions of sanctions, do *not* result in inflexible and rigid practices, incapable of working in a rehabilitory fashion upon inmates, or impossible of improvement by penal authorities. Rather such protections allow the State (and Federal prison systems) the opportunity for creative, if somewhat more burdensome, penology within the framework of the consti-

tutional structure devised by the Founders of this Nation for the resolution of controversies in which one party is faced with the possibility of substantial penalty or "grievous loss." *Gagnon v. Scarpelli*, 411 U.S. 778, 783 & n. 5 (1973); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1971); *Clutchette et al. v. Procunier et al.*, No. 71-2357, April 25, 1974 (9th Cir.)[1]

The reduction of the "sense of injustice" felt by prisoners at disciplinary hearings (whether the underlying factual situation giving rise to a "write up" is or is not contested), the enhancement of a prisoner's self-esteem by affording him fair treatment, which is seen to be fair by the prisoner as well as the prison community, and the opportunity for appropriate sanctions against the prison offender as a result of the openness of the process from which facts are reliably ascertained when minimal due process protections of the *Morrissey-Gagnon* genre are required, all and singularly, are appropriate *because of the multiple and unique institutional setting of prison discipline.*[2]

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[1]Copies of this case are being filed with the Court and served on the State of Nebraska and the Solicitor General contemporaneously with the filing of this brief.

[2]The Solicitor General has raised in the United States' brief the specter of the "inmates' code" as presenting an insurmountable obstacle to open and fair prison hearings. As was pointed out at oral argument the identity of any informant is almost certainly known, but more importantly, the *Morrissey-Scarpelli* procedures take into account the fact that in certain instances secrecy of identity well be needed. Furthermore, there has been devised by lower courts creative solutions to this practical difficulty. *See, Palmigiano v. Baxter*, 487 F.2d 1280, 1290 (1st Cir. 1973); *Birzon v. King*, 469 F.2d 1241 (2d Cir. 1972), *in camera* examination of adverse witnesses by prison disciplinary board when identity of adverse witnesses is

Therefore, the main thrust of the Solicitor General's argument that constitutional protections are not appropriate to the prison setting, and in fact are detrimental to the prison setting, simply does not stand the test of close and careful analysis.

II.

APPLICATION OF RELIEF IN THIS CASE

The Solicitor General contends in the United States' brief that giving full application to any holding of this Court which requires new or more refined constitutional procedural due process protection for prisoners and prison disciplinary proceedings is not appropriate. He argues that past prison disciplinary action should not be invalidated for failure to comply with any new procedural requirements that may be announced by this Court in this case.

In responding to this point it is very important that the Court be aware of the nature of this lawsuit, which is a class action, and which involves more litigants than just the inmate class representative, Robert O. McDonnell. The trial court discussed the nature of this action at several points.[3]

It is appropriate to initially note that the Amended Complaint alleges that all pre-requisites exist for this class action under the provisions of Rule 23, Federal

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legitimately withheld from accused inmate. *See also, Morris v. Travisono,* 310 F. Supp. 857, 873 (D.R.I. 1970), the respondent is informed that all of the original provisions, including the informant rule, for prison hearings were included in the final consent decree entered April 22, 1972.

[3] *See,* R. Vol. II., at 2-3; at 15, 1. 17-p. 16, 1.2; at 109, 1.17-p. 111, 1.22; at 142, 1.7-19, and 1.25-p. 143, 1.8.

Rules of Civil Procedure for the United States District Courts. (*See* R. Vol. I, Filing 21, Amended Complaint, Paragraph 3 at -2-.)

The trial court in its Pre-Trial Order held: "3. The Court finds that a proper class action has been alleged and the case will proceed as such." This Order is referred to in the Relevant Docket Entries at A.2. *See also*, the opinion of the trial court at 342 F. Supp. 616,617 which reads: "The plaintiff, who is incarcerated at that institution, has been allowed to prosecute the case as a class action on behalf of all inmates of the Complex."

It would seem that there is little doubt that the class representative, as well as the other parties who testified in this case as party litigants, have standing to complain of the practices described in the Amended Complaint and documented in the exhibits introduced at the trial. Therefore, it also follows that the relief fashioned by the Court of Appeals in ordering expungement from prisoner's records determinations of misconduct arrived at in unreliable prison disciplinary proceedings was also proper. The Solicitor General touches on this point in the United States' brief where it is stated:

> [I]t is not clear whether it [the Court of Appeals] meant its holding to encompass a general principle of retroactivity or to apply only to the litigants in this case (either the individual or the entire class of prisoners at the Nebraska Complex). Our concern is with the possibility that the holding is to be construed to apply a broad retroactivity principle, and we address ourselves solely to the issue of general retroactivity and not to any question regarding the scope of relief appropriate for these litigants, including the propriety of expungement as a remedy. Brief of the United States as *Amicus Curiae* at 40-41 & n. 24.

Therefore, while the plaintiff argues that giving the full application of the Court of Appeals' mandate on expungement can not properly be construed as an application of a broad retroactivity principle, yet the plaintiff appreciates the point raised by the Solicitor General that the question of the scope of relief appropriate for these litigants, including the propriety of expungement as a remedy, is not questioned by the Solicitor General. The plaintiff certainly believes that regardless of the application of the relief fashioned by this Court for the prisoners who have been the object of constitutionally infirm prison disciplinary proceedings, the parties-litigant in this case, who have brought their factual situations before the trial court at the risk of having other actions involving the same factual situations dismissed,[4] are entitled to the full relief fashioned by the Court of Appeals and whatever relief this Court should fashion on the procedural due process issue.

Therefore, the appropriateness of the remedy of the Court of Appeals of the expungement of prison records arrived at in prison disciplinary proceedings which do not comport with minimum procedural due process protection, one as a general principal, but most certainly as appropriate relief for the parties-litigant in this action, is clear and should be affirmed.

III.

PROCEDURAL NOTE

While it is not raised in the Brief of the Solicitor General there was some discussion at oral argument concerning whether or not the mandate of the Court of

[4] *See*, note 2, *supra*.

Appeals issued, requiring the Nebraska Complex to comply with its dictates, or was stayed pending final order of this Court. On September 21, 1973 the United States Court of Appeals for the Eighth Circuit entered an order for the stay of mandate entered in the consolidated cases before it, one of which is now before this Court on review, for a period of thirty days from and after the date of the order. If within that period the Clerk of the Eighth Circuit received a certificate from the Clerk of the Supreme Court of the United States that a Petition for a Writ of Certiorari and record had been filed in the Supreme Court, the stay thereby granted was continued "until the final disposition of the cases by the Supreme Court."

The Petitioners have timely filed their Petition for Writ of Certiorari and record with this Court, the Court of Appeals for the Eighth Circuit has not issued its mandate in the consolidated cases and will not do so until final disposition of the cases by the Supreme Court. *See,* Rules 41(b) and 25(c) Federal Rules of Appellate Procedure.

CONCLUSION

For the foregoing supplemental reasons it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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May 2, 1974

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WOLFF, WARDEN, ET AL. *v.* McDONNELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 73-679. Argued April 22, 1974—Decided June 26, 1974

Respondent, on behalf of himself and other inmates at a Nebraska prison, filed a complaint for damages and injunctive relief under 42 U. S. C. § 1983, in which he alleged that disciplinary proceedings at the prison violated due process; that the inmate legal assistance program did not meet constitutional standards; and that the regulations governing inmates' mail were unconstitutionally restrictive. After an evidentiary hearing, the District Court granted partial relief. Though rejecting respondent's procedural due process claim, the court held that the prison's policy of inspecting all attorney-prisoner mail was improper and that restrictions on inmate legal assistance were not constitutionally defective. The Court of Appeals reversed with respect to the due process claim, holding that the procedural requirements outlined in the intervening decisions in *Morrissey* v. *Brewer*, 408 U. S., 471, and *Gagnon* v. *Scarpelli*, 411 U. S. 778, should be generally followed in prison disciplinary hearings, but leaving the specific requirements (including the circumstances in which counsel might be required) to be determined by the District Court on remand. The Court of Appeals further held that *Preiser* v. *Rodriguez*, 411 U. S. 475, forbade restoration of good-time credits in a § 1983 suit but ordered expunged from prison records misconduct determinations reached in proceedings that had not comported with due process. The court generally affirmed the District Court's judgment respecting correspondence with attorneys, but added some additional prescriptions and ordered further proceedings to determine whether the State was meeting its burden under *Johnson* v. *Avery*, 393 U. S. 483, to provide legal assistance to prisoners, a duty the court found to extend to civil rights cases as well as habeas corpus proceedings. Under Nebraska's disciplinary

scheme forfeiture or withholding of good-time credits or confinement in a disciplinary cell is provided for serious misconduct and deprivation of privileges for less serious misconduct. To establish misconduct (1) a preliminary conference is held with the chief corrections supervisor and the charging party, where the prisoner is orally informed of the charge and preliminarily discusses the merits; (2) a conduct report is prepared and a hearing held before the prison's disciplinary body, the Adjustment Committee (composed of three prison officials), where (3) the inmate can ask questions of the charging party. *Held:*

1. Though the Court of Appeals correctly held that restoration of good-time credits under § 1983 is foreclosed under *Preiser, supra*, damages and declaratory and other relief for improper revocation of good-time credits are cognizable under that provision. Pp. 12–13.

2. A prisoner is not wholly stripped of constitutional protections, and though prison disciplinary proceedings do not implicate the full panoply of rights due a defendant in a criminal prosecution, such proceedings must be governed by a mutual accommodation between institutional needs and generally applicable constitutional requirements. Pp. 14–15.

3. Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the procedure for determining whether such misconduct has occurred must observe certain minimal due process requirements (though not the full range of procedures mandated in *Morrissey, supra*, and *Scarpelli, supra*, for parole and probation revocation hearings) consonant with the unique institutional environment and therefore involving a more flexible approach reasonably accommodating the interests of the inmates and the needs of the institution. Pp. 15–30.

(a) Advance written notice of charges must be given to the disciplinary action inmate, no less than 24 hours before his appearance before the Adjustment Committee. Pp. 22–23.

(b) There must be "a written statement by the factfinders as to the evidence relied on and reasons for [the disciplinary action]." *Morrissey* v. *Brewer, supra*, at 489. Pp. 23–24.

(c) The inmate should be allowed to call witnesses and present documentary evidence in his defense if permitting him to do so will not jeopardize institutional safety or correctional goals. Pp. 24–25.

(d) The inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings, such

procedures in the current environment, where prison disruption remains a serious concern, being discretionary with the prison officials. Pp. 25–27.

(e) Inmates have no right to retained or appointed counsel in such proceedings, although substitute counsel should be provided in certain cases. Pp. 27–28.

(f) On the record here it cannot be concluded that the Adjustment Committee is not sufficiently impartial to satisfy due process requirements. P. 29.

4. The Court of Appeals erred in holding that the due process requirements in prison disciplinary proceedings were to be applied retroactively by requiring the expunging of prison records of improper misconduct determinations. *Morrissey, supra,* at 490. Pp. 30–31.

5. The State may constitutionally require that mail from an attorney to a prisoner be identified as such and that his name and address appear on the communication; and—as a protection against contraband—that the authorities may open such mail in the inmate's presence. A lawyer desiring to correspond with a prisoner may also be required *first* to identify himself and his client to the prison officials to ensure that letters marked "privileged" are actually from members of the bar. Other restrictions on the attorney-prisoner mail procedure required by the courts below are disapproved. Pp. 31–34.

6. The District Court, as the Court of Appeals suggested, is to assess the adequacy of the legal assistance available for preparation of civil rights actions, applying the standard of *Johnson* v. *Avery, supra,* at 490, that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, inmates could not be barred from furnishing assistance to each other." Pp. 34–37.

— F. 2d —, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion dissenting in part, in which BRENNAN, J., joined. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, *v.* Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 26, 1974]

MR. JUSTICE WHITE delivered the opinion of the Court.

We granted the petition for writ of certiorari in this case, — U. S. —, because it raises important questions concerning the administration of a state prison.

Respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, filed a complaint under 42 U. S. C. § 1983[1] challenging several of the practices, rules, and regulations of the Complex. For present purposes, the pertinent allegations were that disciplinary proceedings did not comply with the Due Process Clause of the Federal Constitution; that the inmate legal assistance program did not meet constitutional standards and that the regulations governing the inspection of mail to and from attorneys for inmates were unconstitutionally restrictive. Respondents requested damages and injunctive relief.

[1] The practices, rules and regulations of the Complex under challenge in this litigation are only in force at that institution, and are drafted by the Warden, and not by the Director of Correctional Services. Since no statewide regulation was involved there was no need to convene a three-judge court. See *Board of Regents* v. *New Left Education Project*, 404 U. S. 541 (1972).

After an evidentiary hearing, the District Court granted partial relief. 342 F. Supp. 616 (Neb. 1972). Considering itself bound by prior circuit authority, it rejected the procedural due-process claim; but it went on to hold that the prison's policy of inspecting all incoming and outgoing mail to and from attorneys violated prisoners' rights of access to the courts and that the restrictions placed on inmate legal assistance were not constitutionally defective.[2]

The Court of Appeals reversed, 483 F. 2d 1059 (1973), with respect to the due process claim, holding that the procedural requirements outlined by this Court in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), and *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), decided after the District Court opinion in this case, should be generally followed in prison disciplinary hearings but left the specific requirements, including the circumstances in which counsel might be required, to be determined by the District Court

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[2] The District Court also determined that contrary to state statutory provisions certain good time had been taken away for violations which were not "flagrant or serious" within the meaning of the controlling state statute, see n. 5, *infra*, and ordered that good time be restored for all such offenses. The Court of Appeals affirmed the holding. Petitioners do not challenge that holding in this Court.

Certain issues originally in contest in this litigation were settled by stipulation and order in the District Court. These concerned such matters as processing inmate letters to sentencing judges, the provision for postage to mail such letters, the adequacy of and access to the prison library, and the availability of a notary service. Others were decided by the District Court, after trial, and were not taken up on appeal to the Court of Appeals. These issues included the denial of use of typewriters to inmates, reprisals against inmates who petition the courts, the number of inmates who could use the prison library at one time, the length of time which could be spent in the library, delay in receiving mail, censorship of letters to the news media and public officials, and limitations on numbers of letters which can be written. None of these issues is raised here.

on remand. With respect to a remedy, the Court further held that *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), forbade the actual restoration of good-time credits in this § 1983 suit but ordered expunged from prison records any determinations of misconduct arrived at in proceedings that failed to comport with due process as defined by the court. The court generally affirmed the judgment of the District Court with respect to correspondence with attorneys,[3] but ordered further proceedings to determine whether the State was meeting its burden under *Johnson* v. *Avery*, 393 U. S. 483 (1969), to provide legal assistance to prison inmates, the court holding that the State's duty extended to civil rights cases as well as to habeas corpus proceedings.[4]

I

We begin with the due process claim. An understanding of the issues involved requires a detailing of the prison disciplinary regime set down by Nebraska statutes and prison regulations.

Section 16 of the Nebraska Treatment and Corrections Act, Neb. Rev. Stat. § 83–185 (1972 Supp.),[5] provides

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[3] No issues are raised here by the State, nor were they in the Court of Appeals, as to the ruling in the District Court on restrictions on outgoing mail.

[4] The Court of Appeals found that the only person allowed to render legal assistance was the "Legal Advisor," and that the Warden did not allow prisoners to consult with other inmates. That finding, which disagreed to some extent with the District Court's, is not challenged by petitioners.

[5] That statutory provision provides, in full:

"(1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

"(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of

that the chief executive officer of each penal facility is responsible for the discipline of inmates in a particular institution. The statute provides for a range of possible disciplinary action. "Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83–1,107 [good time credit] [6] be forfeited or withheld and also that the

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flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83–1,107 be forfeited or withheld and also that the person be confined in a disciplinary cell. The chief executive officer may order that such person, during all or part of the period in a disciplinary cell, be put on an adequate and healthful diet. A person in a disciplinary cell shall be visited at least once every eight hours. No cruel, inhuman or corporal punishment shall be used on any person.

"(3) The chief executive officer shall maintain a record of breaches of discipline, of the disposition of each case, and of the punishment, if any, for each such breach. Each breach of discipline shall be entered in the person's file, together with the disposition or punishment therefor.

"(4) The chief executive officer may recommend to the Director of Corrections that a person who is considered to be incorrigible by reason of frequent intentional breaches of discipline, or who is detrimental to the discipline or the morale of the facility, be transferred to another facility for stricter safekeeping and closer confinement, subject to the provisions of section 83–176."

At the time this litigation was commenced, the statute gave examples of "flagrant or serious misconduct"—"assault, escape, attempt to escape." Rev. Stat. of Neb. 83–185 (1971). This was the definition employed by the District Court in deciding that certain offenses were not serious within the meaning of the Act. See n. 2, *supra*. The statutory change does not affect the issues in this litigation.

[6] Section 83–1,107 Neb. Rev. Stat. (Supp. 1972), which provides for the allowance and reduction of good time, states:

"(1) The chief executive officer of a facility shall reduce, for parole purposes, for good behavior and faithful performance of duties while confined in a facility the term of a committed offender sentenced as

person be confined in a disciplinary cell." Each breach of discipline is to be entered in the person's file together with the disposition or punishment therefor.

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follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, for parole purposes, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:

"(a) From his minimum term, to determine the date of his eligibility for release on parole; and

"(b) From his maximum term, to determine the date when his release under supervision becomes mandatory under the provisions of section 83–1,111.

"(2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole."

"(3) Good time or other reductions of sentence granted under the provisions of any law prior to July 6, 1972, may be forfeited, withheld, or restored in accordance with the terms of this act."

Special provisions are set up by statute dealing with the transfer of minors. See Nebraska Treatment and Corrections Act § 7, as amended by LB57, Session Laws 1973, § 1, Neb. Rev. Stat. § 83–176 (1973 Supp.).

Certain changes made in § 83–1,107, between time suit was brought and now, as related in the prior version of the provision, Neb. Rev. Stat. 83–1,107 (1971), are not important to the issues in dispute here.

Determinations of loss of good time are directly relevant to receiving parole. Under Neb. Rev. Stat. § 83–1,109 (1971), all reductions are to be reported to and considered by parole authorities.

By prison regulation, prisoners may also earn "blood time." The pertinent regulation provides:

"Anyone who donates blood to the American Red Cross receives good time credits for their donations. Anyone under the age of 18 must have the Warden's approval. Those over 18 may voluntarily give blood on the following scheduled months: MAY, AUGUST and

As the statute makes clear, there are basically two kinds of punishment for flagrant or serious misconduct. The first is the forfeiture or withholding of good-time credits, which affects the term of confinement, while the second, confinement in a disciplinary cell, involves alteration of the conditions of confinement. If the misconduct is less than flagrant or serious, only deprivation of privileges results.[7]

The only statutory provision establishing procedures for the imposition of disciplinary sanctions which pertains to good time, section 38 of the Nebraska Treatment and Corrections Act, Neb. Rev. Stat. § 83–1,107 (Supp. 1972), merely requires that an inmate be "consulted regarding the charges of misconduct" in connection with the forfeiture, withholding or restoration of credit. But prison authorities have framed written regulations dealing with procedures and policies for controlling inmate misconduct.[8] By regulation, misconduct is classified into two

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DECEMBER. The Red Cross Bloodmobile unit is generally scheduled for the first full week of the months mentioned above.

"You will reduce from your sentence, via the Board of Parole approval, five days for the first donation, ten days for the second donation, and fifteen days for every donation thereafter.

"Should you receive a disciplinary report or below average work report any time between donations, you will be credited only five days the next time you donated blood to the Red Cross as a result of the disciplinary action."

Since "blood time" operates like good time to reduce the term of sentence, and since it represents only an additional way to accumulate good time, it is considered to be included within the meaning of that term.

[7] The record does not disclose what specific sanctions are employed at the Complex under the general heading of "deprivation of privileges."

[8] The regulations, in full, are:

"*Policy:* In the interest of treatment-oriented discipline, it is necessary that inmates and staff members maintain high standards of behavior, courtesy and personal conduct. It is the policy of this in-

categories: major misconduct is a "serious violation" and must be formally reported to an Adjustment Committee, composed of the Associate Warden Custody, the Correc-

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stitution, in administering discipline, to gain voluntary acceptance of certain limitations by the inmate body. Discipline must be realistically administered in order to maintain the general welfare of the institution community and conformance to specified standards and regulations, while at the same time implementing treatment of the offender.

"*Purpose:* To set forth the institutional policy and procedures for the administration of discipline to insure that disciplinary processes are carried out as an integral part of the total treatment program, and to establish professional standards for all employees in fulfilling this responsibility.

"*Standards of Conduct.* The institution population will be kept informed through the orientation process and by written orders and memorandums as to the standards of conduct expected. When it becomes necessary to regulate and control a man's conformance to the prescribed standards, disciplinary measures consistent with treatment of the individual will be applied in appropriate degree and in an impersonal, impartial manner.

"*Misconduct:*

"a. Major Misconduct: Major misconduct is a serious violation and will be reported formally to the Adjustment Committee on the Misconduct Report form and/or detailed narrative.

b. Minor Misconduct: Minor misconduct is a less serious violation which may be resolved immediately and informally by the inmate's supervisor or formally reported on the Misconduct Report Form. Repeated minor misconduct should be formally reported.

"*Misconduct Reports:*

"a. Preparation: In reporting misconduct on the Misconduct Report Form, the report should be prepared carefully and accurately so as to describe events exactly as they happen. The accurate preparation of a Misconduct Report is a major contributing factor in accurate evaluation of the misconduct by the Adjustment Committee. The initial statement on the report should be a brief statement of the charge or charges, followed by a detailed report of the incident. Articles of evidence should always accompany the report.

"b. Processing of Misconduct Reports: Completed Misconduct Reports along with any articles of evidence, should be forwarded to the

tional Industries Superintendent, and the Reception Center Director. This Committee is directed to "review and evaluate all misconduct reports" and, among other things,

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Chief Correction Supervisor's office for investigation. The Shift Lieutenant will conduct an investigation, note his findings, and submit to the Chief Corrections Supervisor. The Chief Corrections Supervisor will review the report, conduct additional investigation if necessary, interview the Shift Lieutenant and officer submitting report, and verify the accuracy, proper preparation of the report and assemble all information and articles regarding the misconduct report. Upon completion of this investigation, all information will be noted on the space provided on the Misconduct Report, then submitted to the Chairman of the Adjustment Committee so the case may be promptly scheduled for a committee hearing.

"*Administration of Discipline:* The administration of discipline is hereby delegated as follows:

"a. All employees will resolve immediately and informally minor violations by any inmate under their observation and/or supervision.

"b. The Chief Corrections Supervisor will initiate prompt investigation on all misconduct reports and will maintain control of any adverse situation and its inmate participants.

"c. Adjustment Committee will receive reports of misconduct, conduct hearings, and make findings and impose disciplinary actions.

"*The Adjustment Committee:*

"a. Organization: The Adjustment Committee is composed as follows: Associate Warden Custody, Chairman; Correctional Industries Superintendent, Member; Reception Center Director, Member.

"Note: The Adjustment Committee is responsible for the preparation of meeting agenda, recording, distribution, and filing of all reports as necessary for institution requirements. Further, the committee will answer directly to the Administrative Assistant on matters of discipline, adjustment, and investigations conducted relative to the daily processing of Misconduct Reports.

"b. Committee Functions:

"(1) The Adjustment Committee will meet daily at 8:00 a. m. in the office of the Associate Warden Custody and/or the Adjustment Center, as required.

"(2) The Committee will review and evaluate all misconduct reports as to the underlying causes for the adverse behavior and will

to "conduct investigations, make findings, [and] impose disciplinary actions." If only minor misconduct, "a less serious violation," is involved, the problem may either be

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carefully consider all possible courses of action before reaching a decision. Disciplinary action in all cases will be treatment oriented.

"(3) The Committee is authorized to conduct investigations, make findings, impose disciplinary actions, refer cases for further diagnosis, recommend program changes and take any other actions deemed necessary to insure decision effectiveness.

"(4) The Committee will concern itself with institution policies and procedures which effect discipline, strive to maintain consistence in its actions, and continually evaluate the effectiveness of its decisions by appropriate follow-up.

"(5) The Committee will maintain accurate records and assure the prompt and proper completion of all required reports and forms.

"(6) The Committee will review each week or more often, the progress of all inmates housed in the Adjustment Center and initiate or recommend program changes when indicated. The Committee will document all actions, reviews, and program changes so as to provide the Classification Committee with a clear, concise picture of individual inmate adjustment.

"*Adjustment Committee Actions:*

"a. General Principles:

"(1) The decisions and recommendations of the Committee will be the result of group consensus and judgment.

"(2) Full consideration must be given to the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals.

"(3) Disciplinary measures will be taken only at such times and to such degrees as are necessary to regulate and control a man's behavior within acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge.

"(4) Action will be taken as soon after the occurrence as circumstances permit.

"(5) Work assignments and program changes will not be used as disciplinary measures.

"(6) The use of corporal punishment is strictly prohibited.

"(7) Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center,

resolved informally by the inmate's supervisor or it can be formally reported for action to the Adjustment Committee. Repeated minor misconduct must be reported. The Adjustment Committee has available a wide range of sanctions. "Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty,

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withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein.

"*Use of Segregation:* Inmates may be placed in segregation for any one of the following reasons, and documentation on either the Misconduct Report Form or in narrative must be sent to the Associate Warden Custody in each case.

"a. To insure immediate control and supervision.

"b. To protect potential victims.

"c. To insure witnesses against intimidation.

"d. As a punishment for some major institutional infraction.

"e. To control those whose violent emotions are out of control.

"f. To insure their safety or the safety of others.

"g. To insure the safety and security of the institution.

"h. Demonstrated defiance of personnel acting in the line of duty.

"i. Willful refusal to obey orders.

"Note: Inmates awaiting action of the Adjustment Committee will not routinely be placed in the Adjustment Center unless one or more of the above reasons are evident.

"No man should remain in the Adjustment Center longer than necessary, and special care must be taken to insure that this unit does not become a haven for those who persistently fail to solve their problems.

"The Adjustment Committee will conduct a review each week or more often, of all cases in the Adjustment Center in discipline, to consider possible treatment alternatives.

"In addition to this, the institution counselor will maintain a progress file on long-term confinement cases. The Counselor has the responsibility to maintain contact with those inmates who are housed in segregation and report their progress or lack of progress to the Adjustment Committee. These progress reports are prepared at the end of each month and are used as a tool in determining further action by the Adjustment Committee."

confinement in the Adjustment Center [the disciplinary cell], withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein.[9]

Additional procedures have been devised by the Complex governing the actions of the Adjustment Committee. Based on the testimony, the District Court found, 342 F. Supp., at 625–626, that the following procedures were in effect when an inmate is written up or charged with a prison violation: [10]

"(a) The chief correction supervisor reviews the 'write-ups' on the inmates by the officers of the Complex daily;

"(b) the convict is called to a conference with the chief correction supervisor and the charging party;

"(c) following the conference, a conduct report is sent to the Adjustment Committee;

"(d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed;

"(e) if the inmate denies charge he may ask questions of the party writing him up;

"(f) the Adjustment Committee can conduct additional investigations if it desires;

"(g) punishment is imposed."

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[9] When a prisoner is isolated in solitary confinement, there appear to be two different types of conditions to which he may be exposed. He may be incarcerated alone in the usual "disciplinary cell," with privileges severely limited, for as long as necessary, or he may be put in a "dry cell," which unlike regular cells, contains no sink or toilet.

[10] The Warden testified that a great number of cases are resolved without contest, and that in many instances the inmate admits his guilt to the investigating officer.

II

This class action brought by McDonnell alleged that the rules, practices and procedures at the Complex which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amendment. McDonnell sought three types of relief: (1) the restoration of good time; (2) that a plan be submitted by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures.[11]

At the threshold is the issue whether under *Preiser* v. *Rodriguez, supra,* the validity of the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U. S. C. 1983. In *Preiser,* state prisoners brought a § 1983 suit seeking an injunction to compel restoration of good-time credits. The Court held that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, 411 U. S., at 500, with the concomitant requirement of exhausting state remedies. But the Court was careful to point out that

[11] The prayer of the amended complaint asked the court to "[a]djudicate that under the rules, practices and procedures at the Complex the taking of statutory good time from the inmates constitutes an increase in the inmates' sentence without due process of law in violation of the XIV Amendment . . . ." It asked the court to "order the defendants to restore to the plaintiff Robert O. McDonnell that amount of good time taken" from him, and to "[o]rder defendants to submit a plan" which provided "[f]or a hearing procedure in connection with withholding and forfeiture of good time which complies with the requirements of due process . . . ." It further sought damages in the sum of $75,000 for the deprivation of the various constitutional rights involved in litigation, necessarily including the right to due process.

habeas corpus is not an appropriate or available remedy for damage claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody. 411 U. S., at 494, 498–499.

The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser*. But the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U. S., at 499, n. 14.[12] Respondent's damage claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damage award would not be barred by *Preiser*; and because under that case, only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled.[13]

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[12] One would anticipate that normal principles of *res judicata* would apply in such circumstances.

[13] It is suggested that the Court of Appeals wholly excluded the matter of good time from the proceedings on remand. It is true that the court's opinion is arguably ambiguous; but as we understand it, the District Court on remand was to determine the validity

III

The State of Nebraska asserts that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necesarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. *Cruz* v. *Beto*, 405 U. S. 319 (1972); *Cooper* v. *Pate*, 378 U. S. 546 (1964). He retains his right of access to the courts. *Younger* v. *Gilmore*, 404 U. S. 15 (1971), aff'g *Gilmore* v. *Lynch*, 319 F. Supp. 105 (ND Cal. 1970); *Johnson* v. *Avery, supra; Ex parte Hull*, 312 U. S. 546 (1941). Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. *Lee* v. *Washington*, 390 U. S. 333 (1968). The prisoner may also claim the protections of the Due Process Clause. He may not be deprived of his life, liberty or property without due proces of law. *Haines* v. *Kerner*, 404 U. S. 519 (1972); *Wilwording* v. *Swenson*, 404 U. S. 249 (1971); *Screws* v. *United States*, 325 U. S. 91 (1945).

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of the procedures for disciplinary hearings that may result in serious penalties, including good time, and that appropriate remedies were to be fashioned short of actual restoration of good time.

Of course, as we have indicated, that a prisoner retains rights under the Due Process Clause in no way implies that this right is not subject to restrictions imposed by the nature of the regime to which he has been lawfully committed. Cf. *Civil Service Commission* v. *Letter Carriers*, 413 U. S. 548 (1973); *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973); *Parker* v. *Levy*, — U. S. — (1974). Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. Cf. *Morrissey* v. *Brewer*, 408 U. S., at 488. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that "liberty" protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good-time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894 (1961). But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment

"liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context. In *Haines* v. *Kerner, supra,* the state prisoner asserted a "denial of due process in the steps leading to [disciplinary] confinement." 404 U. S., at 520. We reversed the dismissal of the § 1983 complaint for failure to state a claim. In *Preiser* v. *Rodriguez, supra,* the prisoner complained that he had been deprived of good-time credits without notice or hearing and without due process of law. We considered the claim a proper subject for a federal habeas corpus proceeding.

This analysis as to liberty parallels the accepted due-process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The requirement for some kind of a hearing applies to the taking of private property, *Grannis* v. *Ordean,* 234 U. S. 385 (1914), the revocation of licenses, *In re Ruffalo,* 390 U. S. 544 (1968), the operation of state dispute settlement mechanisms, when one person seeks to take property from another, or to government-created jobs held absent "cause" for termination, *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Arnett* v. *Kennedy,* — U. S. —, —, —, — (1974) (POWELL, J., concurring; WHITE, J., concurring in part and dissenting in part; MARSHALL, J., dissenting). Cf. *Stanley* v. *Illinois,* 405 U. S. 645, 652–654 (1972); *Bell* v. *Burson,* 402 U. S. 535 (1971).

We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the indi-

vidual against arbitrary action of government, *Dent* v. *West Virginia*, 129 U. S. 114, 123 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.

IV

As found by the District Court, the procedures employed are (1) a preliminary conference with the chief corrections supervisor and the charging party, where the prisoner is informed of the misconduct charge and engages in preliminary discussion on its merits; (2) a conduct report is then prepared and a hearing held before the Adjustment Committee, the disciplinary body of the prison, where the report is read to the inmate; and (3) the opportunity at the hearing to ask questions of the charging party. The State contends that the procedures already provided are adequate. The Court of Appeals held them insufficient and ordered the due-process requirements outlined in *Morrissey* and *Scarpelli* be satisfied in serious disciplinary cases at the prison.

Morrissey held that due process imposed certain minimum procedural requirements which must be satisfied before parole could finally be revoked. These procedures were:

> "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be

judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U. S., at 489.

The Court did not reach the question as to whether the parolee is entitled to the assistance of retained counsel or to appointed counsel, if he is indigent. Following the decision in *Morrissey*, in *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), the Court held the requirements of due process established for parole revocation were applicable to probation revocation proceedings. The Court added to the required minimum procedures of *Morrissey* the right to counsel, where a probationer makes a request, "based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." *Id.*, at 790. In doubtful cases, the agency was to consider whether the probationer appeared to be capable of speaking effectively for himself, *id.*, at 790–791, and a record was to be made of the grounds for refusing to appoint counsel.

We agree with neither the State nor the Court of Appeals: the Nebraska procedures are in some respects constitutionally deficient but the *Morrissey-Scarpelli* procedures need not in all respects be followed in disciplinary cases in state prisons.

We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation." *Cafeteria Workers* v. *McElroy*, 367 U. S., at 895. "[C]onsideration of what procedures due process may require

under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.*, at 895; *Morrissey*, 408 U. S., at 471. Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless "inflicts a grievous loss on the parolee and often on others." *Morrissey*, 408 U. S., at 481. Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that. The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance. But it is qualitatively and quantitatively different from the revocation of parole or probation.

In striking the balance that the Due Process Clause demands, however, we think the major consideration mili-

tating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing. That the revocation of parole be justified and based on an accurate assessment of the facts is a critical matter to the State as well as the parolee; but the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police or witnesses, at least no more so than in the case of the ordinary criminal trial. Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and dispair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not so paramount. The reality

is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process.

Indeed, it is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free soceity to the maximum possible extent; but with others, it may be essential that discipline be swift and sure.[14] In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary procedings typical of the criminal trial, very likely raise the level of confrontation bebetween staff and inmate and make more difficult the utilization of the disciplinary process as a tool to advance

[14] See generally Bandora, Principles of Behavior Modification (1967); Krasner & Ullman, Research in Behavior Modification (1965); Skinner, Science and Human Behavior (1953).

the rehabilitative goals of the institution. This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account as we now examine in more detail the Nebraska procedures that the Court of Appeals found wanting.

V

Two of the procedures that the Court held should be extended to parolees facing revocation proceedings are not, but must be, provided to prisoners in the Nebraska Complex if the minimum requirements of procedural due process are to be satisfied. These are advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the disciplinary action taken. As described by the Warden in his oral testimony, on the basis of which the District Court made its findings, the inmate is now given oral notice of the charges against him at least as soon as the conference with the chief correction officer and charging party. A written record is there compiled and the report read to the inmate at the hearing before the Adjustment Committee where the charges are discussed and pursued. There is no indication that the inmate is ever given a written statement by the Committee as to the evidence or informed in writing or otherwise as to the reasons for the disciplinary action taken.

Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact. See *In re Gault*, 387 U. S. 1, 33–34 & n. 54 (1967). Neither of these functions was performed by the notice described by the Warden. Although the charges are discussed orally with the inmate somewhat in advance of the hearing, the inmate is sometimes brought before the Adjustment Committee shortly after he is orally informed of the charges. Other times,

after this initial discussion, further investigation takes place which may reshape the nature of the charges or the the evidence relied upon. In those instances, under procedures in effect at the time of trial, it would appear that the inmate first receives notice of the actual charges at the time of the hearing before the Adjustment Committee. We hold that written notice of the charges must be given to the disciplinary action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.

We also hold that there must be a "written statement by the factfinders as to the evidence relied on and reasons" for the disciplinary action." *Morrissey*, 408 U. S., at 489. Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline," Neb. Rev. Stat. § 83–185 ((4) Supp. 1972), and are certainly likely to be considered by the state parole authorities in making parole decisions.[15] Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been

[15] See n. 8, *supra*.

abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.[16]

We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's

[16] A "Survey of Prison Disciplinary Practices and Procedures" of the American Bar Association's Commission on Correctional Facilities and Services (1974) [Survey], reveals that 98% of the 49 prison systems of the States and the United States answering the questionnaire provided written notice of the charges to an inmate. The statistics may be ambiguous, however, since we note that Nebraska is included as a State providing written notice, although the record in this case indicates that only oral notice is provided. The survey also fails to reveal whether notice is supplied in advance of the hearing. The Survey shows that 91% of the systems, out of 34 responses, make a record of the hearings.

interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accomodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity or the hazards presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case. The operation of a correctional institution is at best an extraordinarily difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional impediments. There is this much play in the joints of the Due Process Clause, and we stop short of imposing a more demanding rule with respect to witnesses and documents.

Confrontation and cross-examination present greater hazards to institutional interests.[17] If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability. These

[17] We note that though Nebraska does not as a general matter allow cross-examination of adverse witnesses at the hearing before the Adjustment Committee, the inmate is allowed to ask the charging party questions about the nature of the charges. He is also allowed to speak freely in his own defense.

procedures are essential in criminal trials where the accused, if found guilty, may be subjected to the most serious deprivations, *Pointer* v. *Texas*, 380 U. S. 400 (1965), or where a person may lose his job in the society, *Greene* v. *McElroy*, 360 U. S. 474, 496–497 (1959). But they are not rights universally applicable to all hearings. See *Arnett* v. *Kennedy*, *supra*. Rules of procedure may be shaped by consideration of the risks of error. *In re Winship*, *supra*, 397 U. S. 358, 368 (1970) (Harlan, J., concurring); *Arnett* v. *Kennedy*, *supra* (WHITE, J., concurring), and should also be shaped by the consequences which will follow their adoption. Although some States do seem to allow cross-examination in disciplinary hearings,[18] we are not apprised of the conditions under which the procedure may be curtailed; and it does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination.

Perhaps as the problems of penal institutions change and correctional goals are reshaped, the balance of interests involved will require otherwise. But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States, including Nebraska and the Federal Government, to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle. To some extent, the American adversary trial presumes contest-

[18] The Survey, see n. 25, supra, discloses that cross-examination of witnesses is "allowed" in 28 States, 57% of the 49 systems responding, but the Survey also discloses, that even in these 28 States—the federal system does not allow cross-examination—certain limitations are placed on the use of the procedure. *Id.*, at 19–20.

ants who are able to cope with the pressures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country. At least, the Constitution, as we interpret it today, does not require the contrary assumption. Within the limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries.

We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story privately to prison officals, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem. There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases. Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there would be a limited basis for upsetting such judgments. The better course at this time, in a period where prisons practices are diverse and somewhat experimental, is to leave these

matters to the sound discretion of the officials of state prisons.

As to the right to counsel, the problem as outlined in *Scarpelli* with respect to parole and probation revocation proceedings is even more pertinent here:

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate other than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record and the possibility of judicial review—will not be insubstantial." [Footnote omitted.] 411 U. S., at 787–788.

The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be

held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.

Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. We need not pursue the matter further here, however, for there is no claim that the named plaintiff McDonnell is within the class of inmates entitled to advice or help from others in the course of a prison disciplinary hearing.

Finally, we decline to rule that the Adjustment Committee which conducts the required hearings at the Nebraska Prison Complex and determines whether to revoke good time is not sufficiently impartial to satisfy the Due Process Clause. The Committee is made up of the Associate Warden for Custody as chairman, the Correctional Industries Superintendent and the Reception Director. The Chief Corrections Officer refers cases to the Committee after investigation and an initial interview with the inmate involved. The Committee is not left at large with unlimited discretion. It is directed to meet daily and to operate within the principles stated in the controlling regulations, among which is the command that "full consideration must be given to the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals," as well as the direction that "disciplinary measures will be taken only at such times and to such degrees as are necessary to regulate and control a

man's behavior within acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge." We find no warrant in the record presented here for concluding that the Adjustment Committee presents such a hazard of arbitrary decisionmaking that it should be held violative of due process of law.

Our conclusion that some, but not all, of the procedures specified in *Morrissey* and *Scarpelli* must accompany the deprivation of good-time by state prison authorities [19] is not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court. It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[20]

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[19] Although the complaint put at issue the procedures employed with respect to the deprivation of good time, under the Nebraska system, the same procedures are employed where disciplinary confinement is imposed. The deprivation of good-time and "solitary" confinement are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good-time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good-time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction. We do not suggest, however, that the procedures required by today's decision for the deprivation of good-time would also be required for the imposition of lesser penalties such as the loss of privileges.

[20] The Courts of Appeals, which have ruled on procedures required in prison disciplinary proceedings, have been split. Two Circuits have required written notice in advance, *Clutchette* v. *Procunier*, —

VI

The Court of Appeals held that the due process requirements in prison disciplinary proceedings were to apply retroactively so as to require that prison records

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F. 2d — (CA9 1974); *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (CA7 1973), while two have held that oral notice is sufficient, *Meyers* v. *Alldredge*, 492 F. 2d 296 (CA3 1974); *Braxton* v. *Carlson*, 483 F. 2d 933 (CA3 1973); *Sostre* v. *McGinnis*, 442 F. 2d 178 (CA2 1971 en banc), cert. denied, *sub nom. Oswald* v. *Sostre*, 405 U. S. 978 (1972). The Ninth Circuit, *Clutchette* v. *Procunier*, *supra*, has held that a written statement of reasons and a written record of the proceedings must be provided, while the Second and Third Circuits have held to the contrary, *Braxton* v. *Carlson*, *supra*; *Sostre* v. *McGinnis*, *supra*. Two Circuits have held that there is no right to present witnesses at a hearing, *Braxton* v. *Carlson*, *supra*; *Sostre* v. *McGinnis*, *supra*, while one has held that there must be an opportunity to *request* the calling of witnesses, *United States ex rel. Miller* v. *Twomey*, *supra*. Only the Ninth Circuit, *Clutchette* v. *Procunier*, *supra*, has held that there is the full power and right of an inmate to call witnesses. As to cross-examination, two Circuits have stated that due process does not require this procedure, *Braxton* v. *Carlson*, *supra*; *Sostre* v. *McGinnis*, *supra*. The First Circuit has held, where prison authorities had already extended the right to confront and cross-examine witnesses, that there is no reason to force the authorities to call adverse witnesses when the inmate could have, *Baxter* v. *Palmigiano*, 487 F. 2d 1280 (1973). Only the Ninth Circuit, *Clutchette* v. *Procunier*, *supra*, has held that there is a general right of cross-examination, but even that case holds that the right may be limited where there is a legitimate fear that retribution will result. As to counsel, two Circuits have held that there is no right, even to lay substitutes, *Braxton* v. *Carlson*, *supra*; *Sostre* v. *McGinnis*, *supra*, while the Third Circuit, *Meyers* v. *Alldredge*, *supra*, has held that there is no right to counsel where counsel-substitute is provided. The First Circuit, *Baxter* v. *Palmigiano*, *supra*, holds there is a right to retained counsel, even where a staff-assistant is available, while the Ninth Circuit, *Clutchette* v. *Procunier*, *supra*, envisions some sanctions at disciplinary proceedings calling for provision of counsel, and has determined that counsel must be provided where a prison rule violation may be punishable by state

containing determinations of misconduct, not in accord with required procedures, be expunged. We disagree and reverse on this point.

The question of retroactivity of new procedural rules affecting inquiries into infractions of prison discipline is effectively foreclosed by this Court's ruling in *Morrissey* that the due process requirements there announced were to be "applicable to *future* revocations of parole," 408 U. S., at 490 (emphasis supplied). Despite the fact that procedures are related to the integrity of the fact-finding process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures. During 1973, the Federal Government alone conducted 19,000 misconduct hearings, as compared with 1,173 parole revocation hearings, and 2,023 probation revocation hearings. If *Morrissey-Scarpelli* rules are not retroactive out of consideration for burden on federal and state officials, this case is *a fortiori*. We also note that a contrary holding would be very troublesome for the parole system since performance in prison is often a relevant criteria for parole. On the whole, we do not think that error was so pervasive in the system under the old procedures to warrant this cost or result.

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law. An impartial hearing board has been required, to the extent that a member of the board may not participate in a case as an investigating or reviewing officer, or be a witness, *Clutchette* v. *Procunier*, *supra*; *Braxton* v. *Carlson*, *supra*; *United States ex rel. Miller* v. *Twomey*, *supra*. The Third Circuit, *Meyers* v. *Alldredge*, *supra*, has also held, in the context of the federal system where a prisoner whose good time is taken away goes first to a disciplinary committee and then to the Good Time Forfeiture Board, that an Associate Warden could not sit on both committees.

VII

The issue of the extent to which prison authorities can open and inspect incoming mail from attorneys to inmates, has been considerably narrowed in the course of this litigation. The prison regulation under challenge provided that "all incoming and outgoing mail will be read and inspected," and no exception was made for attorney-prisoner mail. The District Court held that incoming mail from attorneys might be opened if normal contraband detection techniques failed to disclose contraband, and if there was a reasonable possibility that contraband would be included in the mail. It further held that if an incoming letter was marked "privileged," thus identifying it as from an attorney, the letter could not be opened except in the presence of the inmate. Prison authorities were not to read the mail from attorneys. The Court of Appeals affirmed the District Court order, but placed additional restrictions on prison authorities. If there was doubt that a letter was actually from an attorney, "a simple telephone call should be enough to settle the matter," 483 F. 2d, at 1067, the court thus implying that officials might have to go beyond the face of the envelope, and the "privileged," label in ascertaining what kind of communication was involved. The court further stated that "the danger that a letter from an attorney, an officer of the court, will contain contraband is ordinarily too remote and too speculative to justify the [petitioners'] regulation permitting the opening and inspection of all legal mail." While methods to detect contraband could be employed, a letter was to be opened only "in the appropriate circumstances" in the presence of the inmate.

The State now concedes that it cannot open and *read* mail from attorneys to inmates, but contends that it may open all letters from attorneys as long as it is done in the presence of the prisoners. The narrow issue thus pre-

sented is whether letters determined or found to be from attorneys may be opened by prison authorities in the presence of the inmate or whether such mail must be delivered unopened if normal detection techniques fail to indicate contraband.

Respondent asserts that his First, Sixth, and Fourteenth Amendment rights are infringed, under a procedure whereby the State may open mail from his attorney, even though in his presence and even though it may not be read. To begin with, the constitutional status of the rights asserted, as applied in this situation, is far from clear. While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see *Procunier* v. *Martinez*, — U. S. — (1974), this Court has not yet recognized First Amendment rights of prisoners in this context, cf. *Cruz* v. *Beto*, *supra*; *Cooper* v. *Pate*, *supra*. Furthermore, freedom from censorship is not equivalent to freedom from inspection or perusal. As to the Sixth Amendment, its reach is only to protect the attorney-client relationship from intrusion in the criminal setting, see *Black* v. *United States*, 385 U. S. 26 (1966); *O'Brien* v. *United States*, 386 U. S. 345 (1967); see also *Coplon* v. *United States*, 89 U. S. App. D. C. 103, 191 F. 2d 749 (1951), while the claim here would insulate all mail from inspection, whether related to civil or criminal matters. Finally, the Fourteenth Amendment Due Process claim based on access to the courts, *Ex parte Hill*, *supra*; *Johnson* v. *Avery*, *supra*; *Younger* v. *Gilmore*, *supra*, has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint. Moreover, even if one were to accept the argument that inspection of incoming mail from an attorney placed an obstacle to access to the court, it is far from

clear that this burden is a substantial one. We need not decide, however, which, if any, of the asserted rights are operative here, for the question is whether, assuming some constitutional right is implicated, it is infringed by the procedure now found acceptable by the State.

In our view, the approach of the Court of Appeals is unworkable and none of the above rights is infringed by the procedures the state now accepts. If prison officials had to check in each case whether a communication was from an attorney, before opening it for inspection, a near impossible task of administration would be imposed. We think it entirely appropriate that the State require any such communications to be specially marked as originating from an attorney, with his name and address being given, if they are to receive special treatment. It would also certainly be permissable that prison authorities require that a lawyer desiring to correspond with a prisoner, *first* identify himself and his client to the prison officials, to assure the letters marked privileged are actually from members of the bar. As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications since the inmate's presence insures that prison officials will not read the mail. The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials in opening the letters. We disagree with the Court of Appeals that this should only be done in "appropriate circumstances." Since a flexible test, besides being unworkable, serves no arguable purpose in protecting any of the possible constitutional rights enumerated by respondent, we think the State, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, has done all, and perhaps even more, than the Constitution requires.

VIII

The last issue presented is whether the Complex must, and if so has, made available adequate legal assistance, under *Johnson* v. *Avery, supra,* for the preparation of habeas corpus petitions and civil rights actions by inmates. The issue arises in the context of a challenge to a regulation providing, in pertinent part:

> "*Legal Work*
>
> "A legal advisor has been appointed by the Warden for the benefit of those offenders who are in need of legal assistance. This individual is an offender who has general knowledge of the law procedure. He is not an attorney and can not represent you as such.
>
> "No other offender than the legal advisor is permitted to assist you in the preparation of legal documents unless with the specific written permission of the Warden."

Respondent contended that this regulation was invalid because it failed to allow inmates to furnish assistance to one another. The District Court assumed that the Warden freely gave permission to inmates to give assistance to each other, and that *Johnson* v. *Avery, supra,* was thereby satisfied. The Court of Appeals found that the record did not support the assumption and that permission has been denied solely because of the existence of the inmate legal advisor, one of the inmates specially approved by the prison authorities. It decided, therefore, to remand the case to decide whether the one advisor satisfied the requirements of *Johnson* v. *Avery.* In so doing, the court stated that in determining the need for legal assistance, the State was to take into account the need for assistance in civil rights actions as well as habeas corpus suits.

In *Johnson* v. *Avery,* an inmate was disciplined for violating a prison regulation which prohibited inmates

from assisting other prisoners in preparing habeas corpus petitions. The Court held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief," inmates could not be barred from furnishing assistance to each other. 393 U. S., at 490. The court emphasized that the writ of habeas corpus was of fundamental importance in our constitutional scheme, and since the basic purpose of the writ "is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpurpose of presenting their complaints may not be denied or obstructed." *Id.*, at 485. Following *Avery*, the Court affirmed a three-judge court judgment in *Younger* v. *Gilmore, supra*, which required state officials to provide indigent inmates with access to a reasonable law library for preparation of legal actions.

Petitioner contends that *Avery* is limited to assistance in the preparation of habeas corpus petitions and disputes the direction of the Court of Appeals to the District Court that the capacity of the inmate advisor be assessed in light of the demand for assistance in civil rights actions as well as in the preparation of habeas writs. Petitioner takes too narrow a view of that decision.

First, the demarcation line between civil rights actions and habeas petitions is not always clear. The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief. Cf. *Preiser* v. *Rodriguez, supra; Haines* v. *Kerner, supra; Wilwording v. Swenson, supra.* Second, while it is true that only in habeas actions may relief be granted which will shorten the term of confinement, *Preiser, supra*, it is more pertinent that both actions serve to protect basic constitutional rights. The right of access to the courts, upon which *Avery* was premised, is founded in the Due

Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act has less importance in our constitutional scheme than does the Great Writ. The recognition by this Court that prisoners have certain constitutional rights which can be protceted by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts. Although there may be additional burdens on the Complex, if inmates may seek help from other inmates, or from the inmate adviser if he proves adequate, in both habeas and civil rights actions, this should not prove overwhelming. At present only one inmate serves as legal adviser and it may be expected that other qualified inmates could be found for assistance if the Complex insists on naming the inmates from whom help may be sought.

Finding no reasonable distinctions between the two forms of actions, we affirm the Court of Appeals on this point, and as the Court of Appeals suggested, the District Court will assess the adequacy of legal assistance under the reasonable alternative standard of *Avery*.

Affirmed in part, reversed in part, and remanded.

SUPREME COURT OF THE UNITED STATES

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, v. Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 26, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting in part.

I join Part VIII of the Court's opinion, holding that the Complex may not prohibit inmates from assisting one another in the preparation of legal documents unless it provides adequate alternative legal assistance for the preparation of civil rights actions as well as petitions for habeas corpus relief. I also agree with the result reached in Part VII of the opinion of the Court, upholding the inspection of mail from attorneys for contraband by opening letters in the presence of the inmate. While I have previously expressed my view that the First Amendment rights of prisoners prohibit the reading of inmate mail, see *Procunier* v. *Martinez*, — U. S. —, — (1974) (concurring opinion), and while I believe that inmates' rights to counsel and to access to the courts are also implicated here, I do not see how any of these constitutional rights are infringed to any significant extent by the mere inspection of mail in the presence of the inmate.

My disagreement with the majority is over its disposition of the primary issue presented by this case, the extent of the procedural protections required by the Due Process Clause in prison disciplinary proceedings. I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I

fully support the Court's holding that the interest of inmates in freedom from imposition of serious discipline is a "liberty" entitled to due process protection.[1] But, in my view, the content which the Court gives to this due process protection leaves these noble holdings as little more than empty promises. To be sure, the Court holds that inmates are constitutionally entitled to advance written notice of the charges against them and a statement of the evidence relied on, the facts found, and the reasons supporting the disciplinary board's decision. Apparently, an inmate is also constitutionally entitled to a hearing and an opportunity to speak in his own defense. These are valuable procedural safeguards, and I do not mean for a moment to denigrate their importance.

But the purpose of notice is to give the accused the opportunity to prepare a defense, and the purpose of a hearing is to afford him the chance to present that defense. Today's decision deprives an accused inmate of any enforceable constitutional right to the procedural tools essential to the presentation of any meaningful defense, and makes the required notice and hearing formalities of little utility. Without the enforceable right to call witnesses and present documentary evidence, an accused inmate is not guaranteed the right to present any

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[1] The Court defines the liberty interest at stake here in terms of the forfeiture of good time as a disciplinary measure. Since it is only loss of good time that is at issue in this case, this definition is of course quite appropriate here. But lest anyone be deceived by the narrowness of this definition, I think it important to note that this is obviously not the only liberty interest involved in prison disciplinary proceedings which is protected by due process. Indeed, the Court later observes that due process requires the same procedural protection when solitary confinement is at issue. *Ante*, at 30, n. 19. The Court apparently holds that inmates' "liberty" is protected by due process whenever "a major change in the conditions of confinement" is imposed as punishment for misconduct. *Ibid.* I agree. See *Palmigiano* v. *Baxter*, 487 F. 2d 1280, 1284 (CA1 1973).

defense beyond his own word. Without any right to confront and cross-examine adverse witnesses, the inmate is afforded no means to challenge the word of his accusers. Without these procedures, a disciplinary board cannot resolve disputed factual issues in any rational or accurate way. The hearing will thus amount to little more than a swearing contest, with each side telling its version of the facts—and, indeed, with only the prisoner's story subject to being tested by cross-examination. In such a contest, it seems obvious to me that even the wrongfully charged inmate will invariably be the loser. I see no justification for the Court's refusal to extend to prisoners these procedural safeguards which in every other context we have found to be among the "*minimum* requirements of due process." *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972) (emphasis added).

The Court states that it is "of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Ante*, at 24. Since the Court is not ordinarily in the business of giving neighborly advice to state correctional authorities, I think it fair to assume that this statement represents the considered judgment of the Court that the Constitution requires that an accused inmate be permitted to call defense witnesses and present documentary evidence. Still, the Court hardly makes this clear, and ends up deferring to the discretion of prison officials to the extent that the right recognized is, as my Brother DOUGLAS demonstrates, *ante*, at 5–6, practically unenforceable.

I would make clear that an accused inmate's right to present witnesses and submit other evidence in his defense is constitutionally protected and, if unnecessarily abridged, judicially enforceable. As we said only last

Term, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973).

> "The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the [hearing body] so it may decide where the truth lies." *Washington* v. *Texas*, 388 U. S. 14, 19 (1967).

See also *Morrissey* v. *Brewer*, *supra*, 408 U. S., at 489; *In re Oliver*, 333 U. S. 257, 273 (1948). The right to present the testimony of impartial witnesses and real evidence to corroborate his version of the facts is particularly crucial to an accused inmate, who obviously faces a severe credibility problem when trying to disprove the charges of a prison guard. See *Clutchette* v. *Procunier*, — F. 2d —, — (CA9, April 25, 1974); ABA Commission on Correctional Facilities and Services, Survey of Prison Disciplinary Practices and Procedures 19 (1974).

I see no persuasive reason to justify the Court's refusal to afford this basic right to an accused inmate. The majority cites the possible interference with "swift punishment." But how often do we have to reiterate that the Due Process Clause "recognizes higher values than speed and efficiency." *Fuentes* v. *Shevin*, 407 U. S. 67, 90–91 n. 22 (1972). Surely the brief prolongation of disciplinary hearings required to hear the testimony of a few witnesses before reaching what would otherwise seem to be a pre-ordained decision provides no support whatever for refusal to give accused inmates this right. Nor do I see the "obvious potential for disruption" that the majority relies upon in the context of an inmate's right to call *defense* witnesses.

But even if the majority's fear in this regard is justi-

fied, the point that must be made clear is that the accused prisoner's right to present witnesses is the constitutional rule and that the needs of prison security must be accommodated within a narrowly limited exception to that rule. The inmate's right to call witnesses should of course be subject to reasonable limitation by the disciplinary board to prevent undue delay caused by an inmate's calling numerous cumulative witnesses or witnesses whose contributions would be of marginal relevance. The right to call a particular witness could also justifiably be limited if necessary to protect a confidential informant against a substantial risk of reprisal. I agree with the Court that there is this much flexibility in the due process requirement. But in my view the exceptions made to the constitutional rule must be kept to an absolute minimum, and each refusal to permit witnesses justified in writing in the disciplinary file, a rule the majority finds "useful" but inexplicably refuses to prescribe. *Ante*, at 25. And if prison authorities persist in a niggardly interpretation of the inmates' right to call witnesses, it must ultimately be up to the courts to exercise their great responsibility under our constitutional plan and enforce this fundamental constitutional right.

With respect to the rights of confrontation and cross-examination, the gulf between the majority opinion and my views is much wider. In part, this disagreement appears to stem from the majority's view that these rights are just not all that important. Thus, the Court states—not surprisingly, without citation of authority, other than MR. JUSTICE WHITE'S separate opinion in *Arnett* v. *Kennedy*, — U. S. — (1974)—that confrontation and cross-examination "are not rights universally applicable to all hearings." *Ante*, at 26. And the Court suggests that while these procedures may be essential in situations where "serious deprivations" like

loss of employment are at stake, they are not so essential here. I suppose the majority considers loss of a job to be a more serious penalty than the imposition of an additional prison sentence—on this record, ranging up to 18 months—which is the effective result of withdrawal of accumulated good time.

I could not disagree more, both with respect to the seriousness of the deprivation involved here and the importance of these rights. Our decisions flatly reject the Court's view of the dispensibility of confrontation and cross-examination. We have held that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U. S. 254, 269 (1970). And in *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959), we found that the view that cross-examination and confrontation must be permitted whenever "governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings" was one of the "immutable" principles of our jurisprudence—immutable, that is, until today. See also *Arnett* v. *Kennedy*, *supra*, — U. S., at — (dissenting opinion); *Chambers* v. *Mississippi*, *supra*, 410 U. S., at 294–295; *Morrissey* v. *Brewer*, *supra*, 408 U. S., at 489; *In re Gault*, 387 U. S. 1, 56–57 (1967). Surely confrontation and cross-examination are as crucial in the prison disciplinary context as in any other, if not more so. Prison disciplinary proceedings will invariably turn on disputed questions of fact, see *Landman* v. *Royster*, 333 F. Supp. 621, 653 (ED Va. 1971), and, in addition to the usual need for cross-examination to reveal mistakes of identity, faulty perceptions, or cloudy memories, there is a significant potential for abuse of the disciplinary process by "persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy," *Greene* v. *McElroy*, *supra*, 360 U. S., at 496, whether these be other inmates

seeking revenge or prison guards seeking to vindicate their otherwise absolute power over the men under their control. See also *Davis* v. *Alaska*, — U. S. —, — (1974). I can see no rational means for resolving these disputed questions of fact without providing confrontation and cross-examination.

The majority, however, denies accused prisoners these basic constitutional rights, and leaves these matters for now to the "sound discretion" of prison officials. Since we already know how Nebraska authorities, at least, have chosen to exercise this discretion, the Court necessarily puts its stamp of approval on the State's failure to provide confrontation and cross-examination. I see no persuasive justification for this result. The Court again cites concern for administrative efficiency in support of its holding: "Proceedings would inevitably be longer and tend to unmanageability." *Ante*, at 25. I can only assume that these are makeweights, for I refuse to believe that the Court would deny fundamental rights in reliance on such trivial and easily handled concerns.

A more substantial problem with permitting the accused inmate to demand confrontation with adverse witnesses is the need to preserve the secrecy of the identity of inmate informers and protect them from the danger of reprisal. I am well aware of the seriousness of this problem, and I agree that in some circumstances this confidentiality must prevail over the accused's right of confrontation. "But this concern for the safety of inmates does not justify a wholesale denial of the right to confront and cross-examine adverse witnesses." *Clutchette* v. *Procunier*, *supra*, — F. 2d, at —. The need to keep the identity of informants confidential will exist in only a small percentage of disciplinary cases. Whether because of the "inmates' code" or otherwise, the disciplinary process is rarely initiated by a fellow inmate and almost invariably by a correctional officer. I see no legitimate

need to keep confidential the identity of a prison guard who files charges against an inmate; indeed, Nebraska, like most States, routinely informs accused prisoners of the identity of the correctional officer who is the charging party, if he does not already know. In the relatively few instances where inmates press disciplinary charges, the accused inmate often knows the identity of his accuser, as, for example, where the accuser was the victim of a physical assault.

Thus, the Court refuses to enforce prisoners' fundamental procedural rights because of a legitimate concern for secrecy which must affect only a tiny fraction of disciplinary cases. This is surely permitting the tail to wag the constitutional dog. When faced with a similar problem in *Morrissey* v. *Brewer, supra,* we nonetheless held that the parolee had the constitutional right to confront and cross-examine adverse witnesses, and permitted an exception to be made "if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed." 408 U. S., at 487. In my view, the same approach would be appropriate here.

Aside from the problem of preserving the confidentiality of inmate informers, the Court does not require confrontation and cross-examination of known accusers, whether inmates or guards, and indeed does not even require cross-examination of adverse witnesses who actually testify at the hearing. Yet, as THE CHIEF JUSTICE recently observed, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," and "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis* v. *Alaska, supra,* — U. S., at —. I see little basis for the Court's refusal to recognize the accused inmate's rights in these circumstances. The Court apparently

accepts the State's arguments that there is a danger that such cross-examination will produce hostility between inmate and guard, or inmate and inmate, which will eventually lead to prison disruption; or that cross-examination of a guard by an inmate would threaten the guard's traditional role of absolute authority; or that cross-examination would somehow weaken the disciplinary process as a vehicle for rehabilitation.

I do not believe that these generalized, speculative, and unsupported theories provide anything close to an adequate basis for denying the accused inmate the right to cross-examine his accusers. The State's arguments immediately lose most of their potential force when it is observed that Nebraska already permits inmates to question the correctional officer who is the charging party with respect to the charges. See *ante*, at 25, n. 17. Moreover, by far the greater weight of correctional authority is that greater procedural fairness in disciplinary proceedings, including permitting confrontation and cross-examination, would enhance rather than impair the disciplinary process as a rehabilitative tool. President's Commission on Law Enforcement and The Administration of Justice, Task Force Report: Corrections 13, 82–83 (1967); ABA Survey, *supra*, at 20–22; see *Landman* v. *Royster*, *supra*, 333 F. Supp., at 653.

> "Time has proved . . . that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being

treated unfairly." *Palmigiano* v. *Baxter*, *supra*, 487 F. 2d, at 1283.

As THE CHIEF JUSTICE noted in *Morrissey* v. *Brewer*, *supra*, 408 U. S., at 484, "fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."

Significantly, a substantial majority of the States do permit confrontation and cross-examination in prison disciplinary proceedings, and their experience simply does not bear out the speculative fears of Nebraska authorities. See ABA Survey, *supra*, at 21–22. The vast majority of these States have observed "no noticeable effect on prison security or safety. Furthermore, there was general agreement that the quality of the hearings had been 'upgraded' and that some of the inmate feelings of powerlessness and frustration had been relieved." *Id.*, at 21. The only reported complaints have been, not the theoretical problems suggested by petitioners, but that these procedures are time-consuming and have slowed down the disciplinary process to some extent. These are small costs to bear to achieve significant gains in procedural fairness.

Thus, in my view, we should recognize that the accused prisoner has a constitutional right to confront and cross-examine adverse witnesses, subject to a limited exception when necessary to protect the identity of a confidential inmate informant. This does not mean that I would not permit the disciplinary board to rely on written reports concerning the charges against a prisoner. Rather, I would think this constitutional right sufficiently protected if the accused had the power to compel the attendance of an adverse witness so that his story can be tested by cross-examination. See *Clutchette* v. *Procunier*, *supra*, — F. 2d, at —; *Palmigiano* v. *Baxter*, *supra*, 487 F. 2d, at 1290. Again, whenever the right to confront an adverse witness is denied an accused, I would require that

this denial and the reasons for it be noted in writing in the record of the proceeding. I would also hold that where it is found necessary to restrict the inmate's right of confrontation, the disciplinary board has the constitutional obligation to call the witness before it in camera and itself probe his credibility, rather than accepting the unchallenged and otherwise unchallengeable word of the informer. See *Palmigiano* v. *Baxter*, *supra*, 487 F. 2d, at 1290; cf. *Birzon* v. *King*, 469 F. 2d 1241 (CA2 1972). And, again, I would make it clear that the unwarranted denial of the right to confront adverse witnesses, after giving due deference to the judgment of prison officials and their reasonable concerns with inmate safety and institutional order, would be cause for judicial intervention.

The Court next turns to the question of an accused inmate's right to counsel, and quotes a long passage from our decision last Term in *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), in support of its conclusion that appointed counsel need not be provided and retained counsel need not be permitted in prison disciplinary proceedings at this time. The Court seemingly forgets that the holding of *Scarpelli* was that fundamental fairness requires the appointment of counsel in some probation revocation or parole revocation proceedings and overlooks its conclusion that

> "the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-ex-

amining of witnesses or the offering or dissecting of complex documentary evidence." *Id.*, at 786–787.

Plainly, these observations are at least as appropriate in the context of prison disciplinary proceedings. We noted in *Johnson* v. *Avery*, 393 U. S. 483, 487 (1969), that "penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited"; the same considerations provide the motivating force for the holding today in Part VIII of the Court's opinion.

In view of these considerations, I think it is clear that, at least in those serious disciplinary cases meeting the *Scarpelli* requirements, see 411 U. S., at 790, any inmate who seeks assistance in the preparation of his defense must be constitutionally entitled to have it. But, although for me the question is fraught with great difficulty, I agree with the Court that it would be inappropriate at this time to hold that this assistance must be provided by an appointed member of the bar.[2] There is considerable force to the argument that counsel on either side would be out of place in these disciplinary proceedings, and the practical problems of providing appointed counsel in these proceedings may well be insurmountable. But the controlling consideration for me is my belief that, in light of the types of questions likely to arise in prison

[2] On the record in this case, no question is presented with respect to the presence of retained counsel at prison disciplinary proceedings, and I think it inappropriate for the Court to reach out and decide this important issue without the benefit of a concrete factual situation in which the issue arises. I would reserve for another day the questions whether the Constitution requires that an inmate able to afford counsel be permitted to bring counsel into the disciplinary hearing, or whether the Constitution allows a State to permit the presence of retained counsel when counsel is not appointed for indigents. Cf. *Gagnon* v. *Scarpelli*, *supra*, 411 U. S., at 783 n. 6.

discipline cases, counsel-substitutes should be able to provide sufficiently effective assistance to satisfy due process. At least 41 States already provide such counsel-substitutes, ABA Survey, *supra*, at 22, reflecting the nearly universal recognition that for most inmates, this assistance with the preparation of a defense, particularly as disciplinary hearings become more complex, is absolutely essential. Thus, I would hold that any prisoner is constitutionally entitled to the assistance of a competent fellow inmate or correctional staff member—or, if the institution chooses, such other alternatives as the assistance of law students—to aid in the preparation of his defense.

Finally, the Court addresses the question of the need for an impartial tribunal to hear these prison disciplinary cases. We have recognized that an impartial decisionmaker is a fundamental requirement of due process in a variety of relevant situations, see, *e. g.*, *Morrissey* v. *Brewer*, *supra*, 408 U. S., at 485–486; *Goldberg* v. *Kelly*, *supra*, 397 U. S., at 271, and I would hold this requirement fully applicable here. But in my view there is no constitutional impediment to a disciplinary board comprised of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting on disciplinary panels, so as to eliminate any possibility that subtle institutional pressures may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case. See *Clutchette* v. *Procunier*, *supra*, — F. 2d, at —; *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 716, 718 (CA7 1973); *Landman* v. *Royster*, *supra*, 333 F. Supp., at 653. I find it impossible to determine

on the present record whether this standard of impartiality has been met, and I would leave this question open for the District Court's consideration on remand.

Thus, it is my conclusion that the Court of Appeals was substantially correct in its holding that the minimum due process procedural requirements of *Morrissey* v. *Brewer* are applicable in the context of prison disciplinary proceedings. To the extent that the Court is willing to tolerate reduced procedural safeguards for accused inmates facing serious punishment which do not meet the standards set out in this opinion, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, v. Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 26, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The majority concedes that prisoners are persons within the meaning of the Fourteenth Amendment, requiring the application of certain due process safeguards to prison disciplinary proceedings, if those proceedings have the potential of resulting in the prisoner's loss of good time or placement in solitary confinement, *supra*, at p. 29 n. 19. But the majority finds that prisoners can be denied the right to cross-examine adverse witnesses against them, and sustains the disciplinary board's right to rely on secret evidence provided by secret accusers in researching its decision, on the ground that only the prison administration can decide whether in a particular case the danger of retribution requires shielding a particular witness' identity. And in further deference to prison officials, the majority, while holding that the prisoner must usually be accorded the right to present witnesses on his own behalf, appears to leave the prisoner no remedy against a prison board which unduly restricts that right in the name of "institutional safety." Respondents thus receive the benefit of some of the constitutional rights of due process that the Fourteenth extends to all "persons." In my view, however, the threat of any substantial deprivation of liberty within the

prison confines, such as solitary confinement, is a loss which can be imposed upon respondent prisoners only after a full hearing with all due process safeguards.

I

I agree that solitary confinement is a deprivation requiring a due process hearing for its imposition. Due process rights are required whenever an individual risks condemnation to a "grievous loss," *Morrissey* v. *Brewer*, 408 U. S. 471, 481; *Goldberg* v. *Kelly*, 397 U. S. 254, 263; *Joint Anti Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (Frankfurter, J., concurring). Thus due process is required before the termination of welfare benefits, *Goldberg*, *supra;* revocation of parole or probation, *Morrissey*, *supra*, and *Gagnon* v. *Scarpelli*, 411 U. S. 778; revocation of a driver's license, *Bell* v. *Burson*, 402 U. S. 535; attachment of wages, *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337. Every prisoner's liberty is of course circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration, and therefore the imposition of any serious punishment within the prison system requires procedural safeguards. Of course a hearing need not be held before a prisoner is subjected to some minor deprivation, such as an evening's loss of television privileges. Placement in solitary confinement, however, is not in that category. Prisoners are sometimes placed in solitary or punitive segregation for months or even years; *Bryant* v. *Harris*, 465 F. 2d 365 (CA7 1972); *Sostre* v. *McGinnis*, 442 F. 2d 178 (CA2 1971); *Adams* v. *Carlson*, 368 F. Supp. 1050 (ED Ill. 1973); *Landman* v. *Royster*, 333 F. Supp.

621 (ED Va. 1971), and such confinement inevitably results in depriving the prisoner of other privileges as well which are ordinarily available to the general prison population, *La Reau* v. *MacDonald*, 473 F. 2d 974 (CA2 1972); *Wright* v. *McMann*, 387 F. 2d 519 (CA2 1967). Moreover the notation in a prisoner's file that he has been placed in such punitive confinement may have a seriously adverse effect on his eligibility for parole, a risk which emphasizes the need for prior due process safeguards, *Procunier* v. *Cluchette*, No. 71–2357 (CA 9, April 25, 1974).

II

I would start with the presumption that cross-examination of adverse witnesses and confrontation of one's accusers are essential rights which ought always to be available absent any special overriding considerations. In *Morrissey* v. *Brewer*, *supra*, we held that the right to confront and cross-examine adverse witnesses is a minimum requirement of due process which must be accorded parolees facing revocation of their parole "unless the hearing officer specifically finds good cause for not allowing confrontation." *Id.*, at 489. "Because most disciplinary cases will turn on issues of fact . . . the right to confront and cross-examine witnesses is essential." *Landman* v. *Royster*, *supra*, at 653.

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where

> the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." *Greene* v. *McElroy*, 360 U. S. 474, 496–497.

The decision as to whether an inmate should be allowed to confront his accusers should not be left to the unchecked and unreviewable discretion of the prison disciplinary board. The argument offered for that result is that the danger of violent response by the inmate against his accusers is great, and that only the prison administrators are in a position to weigh the necessity of secrecy in each case. But it is precisely this unchecked power of prison administrators which is the problem that due process safeguards are required to cure. "Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized distrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power . . . ." *Covington* v. *Harris*, — U. S. App. D. C. —, 419 F. 2d 617, 621 (1969). Likewise the prisoner should have the right to cross-examine adverse witnesses who testify at the hearing. Opposed is the view that the right may somehow undermine the proper administration of the prison, especially if accused inmates are allowed to put questions to their guards. That, however, is a view of prison administra-

tion which is outmoded and indeed antirehabilitation, for it supports the prevailing pattern of hostility between inmate and personnel which generates an "inmate's code" of noncooperation, thereby preventing the rapport necessary for a successful rehabilitative program. The goal is to reintegrate inmates into a society where men are supposed to be treated fairly by the government, not arbitrarily. The opposed procedure will be counterproductive. A report prepared for the Joint Commission on Correctional Manpower and Training has pointed out that the "basic hurdle [to reintegration] is the concept of a prisoner as a non-person and the jailer as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules . . . maximizing the prisoner's freedom, dignity and responsibility. More particularly, the law must respond to the substantive and precedural claims that prisoners may have . . . ." F. Cohen, The Legal Challenge to Corrections, at 65 (1969). We recognized this truth in *Morrissey*, where we noted that society has an interest in treating the parolee fairly in part because "fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U. S., at 484. The same principle applies to inmates as well.

The majority also holds that "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Supra*, at 24. Yet while conceding that "the right to present evidence is basic to a fair hearing," *ibid.*, the Court again chooses to leave the matter in the discretion of prison officials, who are not even required to state their reasons for refusing a prisoner his right to call a witness, although the Court finds that such a statement of reasons would be

"desirable." *Supra*, at 25. Thus although the Court acknowledges the prisoner's right it appears to leave him with no means of enforcing it.

As the Court itself agrees in holding that the disciplinary board must provide a statement of reasons for its ultimate determination on the merits, *supra*, at 23–24, such a written statement is crucial not only to provide a basis for review, but to ensure that the Board "will act fairly." *Ibid.* Of course even in a criminal trial the right to present one's own witnesses may be limited by the trial judge's finding that the evidence offered is irrelevant, incompetent, or needlessly repetitious, and certainly the same restrictions may apply in the prison setting. But when the judge makes such a ruling it is a matter in the record which may be challenged on appeal. Nebraska may not provide any channel for administrative appeal of the Board's ruling, but because "the fundamental requisite of due process of law is the opportunity to be heard," *Goldberg* v. *Kelly*, 397 U. S. 254, 267, some possibility must remain open for judicial oversight. Here as with the rights of confrontation and cross-examination, I must dissent from the Court's holding that the prisoner's exercise of a fundamental constitutional right should be left within the unreviewable discretion of prison authorities.

Our prisons are just now beginning to work their way out of their punitive heritage. The first American penitentiary was established in Philadelphia in 1790; it contained 24 individual cells for the solitary confinement of hardened offenders. P. Tappan, Crime, Justice and Correction, at 605–606 (1960). Under this "Pennsylvania System" the prisoner was continuously confined to solitary and all communication was forbidden with the exception of religious advisors and official visitors. Wilson, The Crime of Punishment, at 219–220. New York experimented with this approach but found it too severe,

and adopted instead a compromise solution known as the "Auburn" or "silent" system, in which inmates were allowed to work in shops with others during the day, although under a strict rule of silence, and then returned to solitary confinement at night. Prisoners were marched around in military lock-step with their eyes cast on the ground, and the violations of any rules resulted in the immediate infliction of corporal punishment by the guards. Tappan, *supra*, at 609–610. Although the harsh treatment produced an orderly prison, it came under criticism because of its inhumanity, with particular emphasis on the unfettered discretion of the guards to impose punishment on the basis of vague charges that were never subjected to detached or impartial evaluation. Livingston, System of Penal Law, Introductory Report to the Code of Reform and Prison Discipline, at 8 (1828).

We have made progress since then but the old tradition still lingers. Just recently an entire prison system of one State was held so inhumane as to be a violation of the Eighth Amendment bar on cruel and unusual punishment. *Holt* v. *Sarver*, 309 F. Supp. 362 (ED Ark. 1970), aff'd, 442 F. 2d 304 (CA8 1971). The lesson to be learned is that courts cannot blithely defer to the supposed expertise of prison officials when it comes to the constitutional rights of inmates.

> "Prisoners often have their privileges revoked, are denied the right of access to counsel, sit in solitary, or maximum security or lose "goodtime" on the basis of a single unreviewed report of a guard. When courts defer to administrative expertise, it is this guard to whom they delegated the final word on reasonable prison practices. This is the central evil in prison . . . the unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners." Hirschop

and Millmen, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 811–812 (1969).

The prisoner's constitutional right of confrontation should not yield to the so-called expertise of prison officials more than is necessary. The concerns of prison officials in maintaining the security of the prsion and of protecting the safety of those offering evidence in prison proceedings are real and important. But the solution cannot be a wholesome abrogation of the fundamental constitutional right to confront one's accusers. The danger of retribution against the informer is not peculiar to the prison system; it exists in every adversary proceeding, and the criminal defendant out on bail during his trial might present a greater threat to the witness hostile to his interests than the prison inmate who is subject to constant surveillance. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 492. If there is an "inmates code" of the prison, based upon hostility to the authorities, which proscribes inmate cooperation with prison officials in disciplinary proceedings, it is probably based upon the perceived arbitrariness of those proceedings. That ethic, which is clearly antirehabilitative, must be ferretted out, but I do not see how the petitioners can rely on their current failure to correct this evil for the perpretration of an additional one—the denial of the right to confrontation. In some circumstances it may be that an informer's identity should be shielded. Yet in criminal trials the rule has been that if the informer's information is crucial to the defense, then the government must choose between revealing his identity and allowing confrontation, or dismissing the charges. *Roviaro* v. *United States*, 353 U. S. 53. And it is the court, not the prosecutor, who determines the defendant's need for the information. We should no more place the inmate's constitutional rights in the hands of the prison administration's discretion

than we should place the defendant's right in the hands of the prosecutor.

Insofar as the Court affirms the judgment of the Court of Appeals I concur in the result. But the command of the Due Process Clause of the Fourteenth Amendment compels me to dissent from that part of the judgment allowing prisoners to continue to be deprived of the right to confront and cross-examine their accusers, and leaving the right to present witnesses in their own behalf in the unreviewable discretion of prison officials.

III

Finally, the Court again, as earlier this term in *Procunier* v. *Martinez*, — U. S. —, sidesteps the issue of the First Amendment rights of prisoners to send and receive mail. I adhere to the views expressed by my Brother MARSHALL and myself earlier this term in our separate opinions in *Procunier*. I agree, however, with the Court that the prisoners' First Amendment rights are not violated by inspection of their mail for contraband, so long as the mail is not read and the inspection is done in the prisoner's presence so that he can be assured that the privacy of his communications is not breached. Such a procedure should adequately serve the prison administration's interest in ensuring that weapons, drugs, and other prohibited materials are not unlawfully introduced into the prison, while preserving the prisoner's First Amendment right to communicate with others through the mail.